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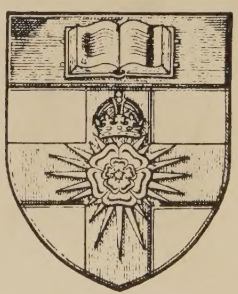

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THE IRISH REPORTS.

1925—Vol I.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE SUPREME COURT

IN

THE IRISH FREE STATE.

EDITED BY

ALBERT D. BOLTON,

BARRISTER-AT-LAW.

1925.

VOL. I.

CHANCERY AND LAND COMMISSION.

DUBLIN:

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

1925.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS

Supreme Court.

Hugh Kennedy, *Chief Justice.*
The Right Hon. Charles A. O'Connor.
Gerald FitzGibbon.
James Augustine Murnaghan.

High Court.

Timothy Sullivan, *President.*
James Creed Meredith.
The Right Hon. Thomas Lopdell O'Shaughnessy.
William John Johnston.
James Augustine Murnaghan.
Henry Hanna.

Irish Land Commission.

The Hon. William E. Wylie.

Attorney-General.

John O'Byrne K.C.

[These Reports will be cited as follows :—[1925] 1 I. R.]

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High Court of Justice,	R. Rice, ... T. C. Tobias, . . . Hector Hughes, G. Gavan Duffy,	Barristers-at-Law.

MEMORANDUM.

On the 30th April, 1925, Right Hon. Charles A. O'Connor (formerly Master of the Rolls in Ireland) resigned his office as Judge of the Supreme Court of Justice of the Irish Free State.

On the 1st May, 1925, Mr. Justice Murnaghan was appointed a Judge of the Supreme Court of Justice of the Irish Free State.

On the 1st May, 1925, Mr. Serjeant Hanna K.C. was appointed a Judge of the High Court of Justice of the Irish Free State.

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

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THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM BY

THE SUPREME COURT

IN

THE IRISH FREE STATE.

1925.

KEELAN *v.* GARVEY (1).

(1923. No. 496).

Supreme Court. 1924. Nov. 3, 4. Dec. 9.

Statute of Limitations — Husband and wife — Husband in possession of lands as tenant — Husband going away and wife remaining in possession — Wife claiming title to lands as against her husband — Character of wife's occupation—Real Property Limitation Act, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 7 — *Wife's title erroneously registered — Rectification of register—Local Registration of Title (Ireland) Act,* 1891 (54 & 55 *Vict. c.* 66), *sect.* 34.

Plaintiff's father died in 1896, having by his will bequeathed his small farm to plaintiff, subject to the use of two apartments and a small piece of ground, with other privileges, to his wife (plaintiff's mother), and also subject to the use, by another son, of certain workshops, with two other apartments. In February, 1897, plaintiff married, and he and his wife resided on the farm, where plaintiff's mother and brother also continued to reside. Soon after the marriage quarrels took place between plaintiff and his wife, whereupon, in November, 1897, he left the farm, and did not return until 1923, after the death of his wife. His wife continued to reside at, and manage the farm until her death. Plaintiff's mother left the farm in February, 1902, but until her death in 1914 she had the use of the small piece of ground, and received annual supplies of potatoes, &c., from the farm, as directed by her husband's will. In 1908 or 1909 plaintiff's brother left the farm.

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON J.

Supreme Court. 1924.

KEELAN v. GARVEY.

On November 1st, 1906, plaintiff's wife signed an agreement for the purchase of the holding under the provisions of the Irish Land Act, 1903. On May 13th, 1909, the holding was vested in her by fiat of the Land Commission, and on November 26th, of the same year, she was registered in the Land Registry as owner in fee-simple, "subject to equities." On November 16th, 1919, the note on the register in regard to equities was, on her application, cancelled. In her affidavit in support of that application she stated that the plaintiff left the country in 1897; that he had not since been heard of, and was believed to be dead, and that since his departure she had been in sole and undisturbed possession of the lands. With the exception of two letters, written within a week after his departure, his wife had during all the years received no communication from the plaintiff. In one of these letters he asked her to sell crops, and pay some debts he owed, and in the other letter he stated he was going abroad (though he did not do so). The wife died on April 16th, 1923, and by her will devised and bequeathed the farm to her brother. Plaintiff claimed to be beneficially entitled to the farm, and sought a declaration that his wife's executor held the farm as a trustee for him.

Held, that the plaintiff never ceased to be in possession of the farm, that his wife never entered into possession adversely to him; that she was provided with a residence and with support on his farm in fulfilment of his marital obligations; and that the Statute of Limitations never ran against him, and, accordingly, that his wife's executor was a trustee of the legal estate for him.

Held also, that a mistake had been made in registering the title of his wife to the farm "free from equities," and that the register must be rectified accordingly.

Decision of Molony L.C.J. [1924] 1 I.R. 107, reversed.

Jack v. *Walsh,* 4 Ir.L.R. 254, distinguished.

APPEAL by Peter Keelan, the plaintiff, from an order made by Molony L.C.J., sitting for the Master of the Rolls on May 13th, 1924, by which he declared that the appellant's wife had acquired a title under the Statute of Limitations to a farm of land at Corduff, County Monaghan (1).

The facts are briefly summarised in the head-note and are fully stated in the judgment of Kennedy C.J.

Overend K.C. (with him *Wood K.C.* and *Geoghegan*), for the appellant:—

At common law husband and wife are one person. The Married Women's Property Act, 1882, was a statute passed for the protection of a wife's separate property, and it does not affect the property of the husband: *In re Harkness and Allsopp's Contract* (2); *Butler* v. *Butler* (3). When the appellant left the holding his wife entered into possession as his bailiff. She signed the agreement to purchase as bailiff, and then became trustee for her husband. No change had taken place in the character of her possession. We submit that the Statute of Limitations cannot run in favour of a wife against her husband. Even if the statute could run against a husband its operation in this case was excluded by the fact that the wife

(1) [1924] 1 I.R. 107. (2) [1896] 2 Ch. 358. (3) 16 Q.B.D. 374.

was a trustee for her husband. A person who enters into possession as bailiff for another person remains bailiff until the relationship is dissolved: *M'Mahon* v. *Hastings* (1).

The Court has power in this suit to direct a rectification of the register under section 34 of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66).

M'Cann K.C. and *Lavery*, for the respondent:—

There was an apparent abandonment of the property by the husband, and bailiffship is inconsistent with the evidence. The wife was a tenant at will, and the Statute of Limitations began to run in her favour one year after the husband had gone away: *Jack* v. *Walsh* (2). The vesting order did not interfere with the accruing right under the Statute of Limitations. The unity of husband and wife relied upon by the appellant is destroyed by the Married Women's Property Act, 1882, so far as proprietary rights, as between husband and wife, are concerned.

Sands v. *Dooley* (3) is authority for the proposition that a married woman is capable of possession which may form the foundation of title under the Statute of Limitations. [They also referred to *Hill* v. *Hill* (4); Halsbury's Laws of England, Vol. 16, page 434, par. 884.]

Even assuming bailiffship to have existed originally, an end was put to it: *In re Maguire and M'Clelland's Contract* (5).

A person registered as owner with the equities discharged has, in the absence of fraud, an absolute and indefeasible title. Fraud is not charged in this case. As to the grounds upon which the register will be rectified, see *In re Leonard's Estate* (6).

Overend K.C., in reply, referred to *Rice* v. *Begley* (7).

KENNEDY C.J.:—

This action is concerned with a small holding of land, part of the lands of Corduff, containing 22 acres 1 rood and 10 perches statute measure, in the Barony of Farney, and County of Monaghan, now registered in Folio 4489 of the Register, County Monaghan, subject to a land purchase annuity of £6 16s. 6d., payable to the Irish Land Commission under the Irish Land Act, 1903. The land purchase advance was £210, and the Poor Law Valuation is £10 10s.

The holding, which was situate on what was called the Shirley Estate, was formerly held by one Patrick Keelan, father of the plaintiff, under a present tenancy, upon which a judicial rent of £10 a year was fixed by Order in the year 1888.

(1) [1913] 1 I. R. 395.
(2) 4 Ir. L. R. 254.
(3) 46 Ir. L. T. R. 197.
(4) [1916] W. N. 59.
(5) [1907] 1 I. R. 393.
(6) [1912] 1 I. R. 212, at p. 226.
(7) [1920] 1 I. R. 243.

Supreme Court. 1924.

KEELAN v. GARVEY.

Kennedy C.J.

Patrick Keelan died on the 22nd day of June, 1896, having made a will dated the 15th June, 1896, which was duly proved on the 13th November, 1896, by Bernard M'Kitterick and Patrick Hand, the executors therein named.

By his said will Patrick Keelan gave and bequeathed the said holding, or farm of land, to his son, Peter Keelan, the plaintiff, but the will went on to provide that his (testator's) wife, Catherine Keelan (whom I will hereafter refer to as Catherine Keelan, senior), should have "full possession of the sleeping apartment" then occupied by her "with the apartment immediately over it during her day." He further provided that his son, Patrick Keelan, was "to have the use of the workshops, with the two apartments under it as long as he chooses." The will also contained the following provision:—"My son, Peter Keelan, is to allow to his mother, Catherine Keelan, before-mentioned, three hundred weight of oaten meal per year, or, in lieu thereof, two pounds sterling per year, all the produce of half a rood of potatoes per year, and the use of an acre of ground, or thereabouts, situated on the side of the road farthest from the house, all during her day, and all free of any expense on her part."

On the 13th February, 1897, the plaintiff married Catherine Ward (whom I will hereafter refer to as Catherine Keelan, junior), and she went to live with him on the holding where also Catherine Keelan, senior, and the plaintiff's brother, Patrick, continued to reside. Catherine Keelan, junior, does not appear to have brought any fortune to her husband, and no settlement was made on the marriage.

Soon after the marriage quarrels took place between the parties, whereupon, in the month of November, 1897, the plaintiff left the farm, and did not return until the year 1923, upon the death of his wife.

From November, 1897, when the plaintiff left, there continued to live on the holding the plaintiff's wife, Catherine Keelan, junior, his mother, Catherine Keelan, senior, and his brother Patrick, until the respective dates which I will mention later.

In the month of February, 1902, Catherine Keelan, senior, left the holding, and went to reside with a married daughter in the same neighbourhood, and so continued until her death in the month of May, 1914. All during that period, up to her death, she received the oatmeal and potatoes provided for her by her husband's will, and she had the use of the acre of land according to the will, and kept some live stock upon it.

In the year 1908 or 1909, the plaintiff's brother, Patrick, left the holding, and does not appear to have returned there at any time.

On the 1st November, 1906, Catherine Keelan, junior, signed an agreement for the purchase of the holding under the provisions of the Irish Land Act, 1903. In that agreement, which is in

the usual form, Catherine Keelan, junior, is described as "tenant in occupation of the said holding." The agreement does not contain any reference to any other person as having any interest in the holding, nor is Catherine Keelan described as a married woman.

On the 13th May, 1909, the holding was vested in Catherine Keelan, junior, by fiat of the Irish Land Commission, and on the 26th November, of the same year, she was registered in the Land Registry as owner in fee-simple of the holding "subject to the rights or equities (if any) arising from the interest vested" in her by the said fiat "being deemed to be a graft on her previous interest in the land or arising in any other manner from the existence of such previous interest." She is described on the register as "wife of Peter Keelan."

On the 6th November, 1919, Catherine Keelan, junior, made an application (verified by affidavit) to the Registrar to cancel the note as to rights or equities entered on the folio of the said holding. She shows title by stating that Peter Keelan entered into possession of the lands on his father's death, and was accepted as tenant, and continued as such "until November, 1897, when he left this country." She states that he has not since been heard of, and is believed to be dead, and that since his departure she "has remained in sole and undisturbed possession of said lands." She adds: "The applicant has been in sole beneficial occupation of the said lands since the month of November, 1897,"—a statement which is contrary to the fact. She states on oath that she believes she has a good title to an estate in fee-simple in the lands, and that there is no person to her knowledge or belief who has, or claims, any estate, right, title, or interest in, or to the lands, and that all wills and other instruments affecting the title and all facts material to the title were disclosed by her. This was, of course, incorrect, for she had not disclosed the will of Patrick Keelan, nor the fact of the rights enjoyed by Patrick Keelan, junior, and by Catherine Keelan, senior, long after the year 1897. In discharge of a ruling by the Examiner in the Land Registry requiring independent evidence, she filed an affidavit by one, Patrick Caragher, which purports to corroborate from personal knowledge the statements upon which she had grounded her application. Upon this evidence the note as to rights or equities on the register was cancelled.

On the 17th March, 1923, Catherine Keelan, junior, died, having made a will, dated the 27th December, 1922, which was, on the 16th April, 1923, proved by James Garvey, the defendant in this action, and the sole executor named in the will. By her said will Catherine Keelan, junior, purported to devise and bequeath the holding to her brother, Patrick Ward, subject to certain charges.

On the 29th June, 1923, the plaintiff issued his writ in the present action, claiming a declaration that he is beneficially

Supreme Court. 1924.

KEELAN v. GARVEY.

Kennedy C.J.

entitled to the holding as owner in fee-simple; and a declaration that Catherine Keelan signed the Land Purchase agreement, and was registered as owner of the said lands merely as a trustee for the plaintiff; and a declaration that the defendant, as personal representative of Catherine Keelan, deceased, is trustee of the said lands for the plaintiff; and claiming an order declaring the registration of the said lands in the name of Catherine Keelan, discharged from equities, void, and directing the register to be rectified by restoring the note as to equities, and an order directing the defendant, as personal representative of Catherine Keelan, to convey and transfer the legal estate in the said lands to the plaintiff. In the Statement of Claim it was pleaded that Catherine Keelan signed the purchase agreement "as representative or bailiff of the plaintiff," and that the cancellation of the note as to equities was obtained by Catherine Keelan "by mistake or by fraudulent misrepresentation." The defendant, by his defence, relies on the fact alleged, of sole beneficial occupation and possession of the lands by Catherine Keelan from 1897 to her death without acknowledgment of any right, title, or estate in any other person, and pleads the Real Property Limitation Act, 1874, and the Limitations Act, 1833. In the reply, it is pleaded that Catherine Keelan was in possession as wife of the plaintiff, and on his behalf, and as bailiff or agent, and was liable to account to the plaintiff, and that the plaintiff was, in fact, in virtual possession through his said wife.

The action was tried by Molony L.C.J., sitting for the Master of the Rolls.

The plaintiff's oral evidence at the trial fills in the picture which appears in outline in the narrative of admitted facts and dates which I have just recited. He went away in November, 1897. To the Judge who put the question: "You weren't happy in your married life"?—he replied: "I wouldn't get leave to be happy." He appears to have first gone to Dundalk, where he wrote a letter to his wife informing her that he was going abroad. He then went to Liverpool, and there, within a week or so from the time he left the farm, he wrote his second and last letter to his wife. Neither letter is forthcoming, but his evidence is that, in the second letter, he bade his wife sell the oats, and pay a few pounds "he owed off the farm: £16 or £17," and that he "told her to set the ground if she wished." Asked if he said anything in the letter as to how long he was going to be away, he answered: "No, because I was greatly knocked about." Two brothers of the wife, who gave evidence for the defendant, swore that they had seen the Liverpool letter, and that the plaintiff in that letter told his wife to get her brother, Patrick, to help her on the farm. His evidence was that he never, in fact, went abroad, but returned from Liverpool almost immediately, and worked as a labourer for a time at Portrane, and afterwards at Kildare, and during the whole

time earned a living for himself without asking or receiving any money out of the farm. From November, 1897, until his wife died in 1923, he never went back to the farm, and never had any direct communication with his wife. He says, however, that he heard from the place regularly. He was kept informed from the neighbourhood as to what his wife was doing with the farm, that she was letting the land, and so on. He says that he sent his wife a message on one occasion, but, objection being taken, the nature of the message was not disclosed. In cross-examination he was asked: "You made up your mind to leave the place?" He replied: "I couldn't live in it." The next question was: "You made up your mind that day that you were going away for good?" to which his answer was, "No, but as long as she was there." He explains his not asking for any account of the proceeds of the farming or for any share of the proceeds, by saying that he did not want it—referring to the fact that he had work. The plaintiff's sister, Bridget Ward, proved that on the death of Catherine Keelan, junior, immediately after the funeral, she took possession of the place. She then advertised for the plaintiff, to whom she handed over possession, on his return, as a result of the advertisement.

The case made by the plaintiff on these facts is that the wife was in possession of the farm as bailiff, agent, or trustee for the plaintiff throughout the whole period. It was also argued that the old doctrine of unity of person of husband and wife has survived the Married Women's Property Acts for some purposes, and that, by reason of such unity of person, the possession here was always the possession of the husband. It was contended on the part of the defendant that the facts amounted to this, in effect, that the husband going away, put his wife in possession as his tenant at will and that the statutory limitations applicable to a tenancy at will govern the case, and have ousted the plaintiff's title.

The first and principal question to be determined upon the evidence is whether Catherine Keelan, junior, entered into possession of the holding, and the character of that possession; and, if not originally a possession adverse to the plaintiff, that is to say,—"adverse" in the modern sense, as used by Lord St. Leonards—did its character change, and when, so as to start the Statutes of Limitations running against the plaintiff?

Now, we cannot interpret the evidence without due regard to the status and condition of the parties, and the legal and moral rights and obligations arising from such status and condition.

A husband is bound to maintain his wife according to his estate, or condition in life, or according to his means of supporting her. If he deserts her, she becomes entitled to pledge his credit for necessaries. The wife is bound to reside and co-habit with her husband. This right of consortium implies still a unity of person which is seen, for instance, in the legal unity of domicile.

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How, then, does the evidence stand in the present case? The plaintiff became owner of this little holding, subject to certain trusts in favour of his mother and brother. He marries and takes a wife to live with him upon his holding, which becomes their residence and common home as well as their common means of livelihood. Some cause of unhappiness arises which renders co-habitation insupportable to the husband. He goes away from his home to live as best he may by his labour, but free from the unhappiness now existing in his home. Mr. M'Cann says it is a case of common desertion by the husband; but if the evidence is believed (and it is not contradicted) that the wife made life, with her, unbearable by this man, she could not have established a case of desertion by him. He simply goes away and becomes a wanderer for the time being until such time as he may again return to find peace in his own home. The home is not broken up; the rest of the family circle—mother and brother and wife—live on there and maintain themselves out of the farm as before. Are these facts incompatible with the continuance of possession by the husband? Do they establish that the wife is in adverse possession to the husband? Do they not rather show the wife living in her husband's residence and home in enjoyment of the support and maintenance according to her husband's estate and condition in life which is her right?

In my opinion, the plaintiff has never ceased to be in possession of the holding. In my opinion, the wife never entered into possession of the holding against the husband. In my opinion, the wife was provided with a residence and support in her husband's farm in fulfilment of the husband's marital obligations. It follows, I am of opinion, that the Statutes of Limitations never ran against the plaintiff and that his title has not been ousted.

The case of *Jack* v. *Walsh* (1), upon which Mr. M'Cann relies, is plainly distinguishable upon the ground that the adverse claimant there was not the wife of the owner of the lands but a stranger in law, and this distinction is actually recognised by Burton J. who delivered the judgment of the Court, as if in anticipation of some such case as the present one.

The purely legal and technical defence is then urged that the note as to rights or equities has been cancelled in the Land Registry, and that the wife is now the registered owner in fee simple, and that the register is conclusive in the absence of fraud or mistake. Counsel for the plaintiff disclaims any case of fraud, but relies on mistake. The procedure leading to the cancellation of the note as to equities is far from reassuring as to the methods adopted by the Land Registry in such cases. The thinnest evidence was acted upon, and, though the husband was not accounted for in the affidavits lodged, no care was taken

(1) 4 Ir. L. R. 254.

by the direction of the proper advertisements or otherwise to see that he was protected if he should have a title. No attempt by search in the Probate Office was made to test the statement as to the devolution from Patrick Keelan. It would be a travesty to hold that the plaintiff's title was ousted by these careless proceedings behind his back. A mistake has been made which must be rectified, and we have full power to rectify under the statute, as well as in equity.

I am of opinion, therefore, that the plaintiff has established his case, and that the appeal must be allowed with costs, the defendant being declared to be a trustee of the legal estate for the plaintiff.

O'CONNOR J. :—

The judgment of the late Lord Chief Justice was based on his finding that Catherine Keelan became at least tenant at will to her husband on his leaving the farm in the year 1897. If I could arrive at the same conclusion on the facts I would concur with him, but in my opinion the learned Chief Justice did not give due consideration to the peculiar relationship which exists between husband and wife. It is true that the old doctrine of unity of ownership and possession as between husband and wife has been abolished by the Married Women's Property Act, but there still remains a relationship between them arising out of the marriage tie, and the mutual duties and obligations thereby imposed, which must be taken into consideration when the question arises between them as to the exclusive possession by either of the property of the other. It is the moral duty of a wife within certain limits to guard and manage her husband's property, and, in most cases, this is not merely recognized but cheerfully accepted and performed. Take, for instance, the case of a farmer who is obliged to leave his home and go to a foreign country, there to remain for a considerable or uncertain time, whether for business purposes or in the performance of a duty, such as military service. His wife remains behind, manages the farm, keeps up the home, and supports out of the profits herself and her children, if there are any. It cannot be said that in such a case there is any change in the legal possession of the husband. His actual possession would no doubt cease during his absence, but there would still remain a certain unity between them which would make the possession of the wife the possession of the absent husband. I do not say that such unity could not be broken. There might be such a severance as would destroy the unity. For instance, if the husband announced to his wife that he did not intend to return, that he abandoned her and his family and farm, or if the circumstances showed that such was his intention, then the conclusion might fairly be drawn that the previous unity which made the wife the mere bailiff or agent of her husband was severed, and that her subsequent possession was not his

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possession, but her own. But in such a case and in analogous cases the question would be one of fact to be arrived at from all the circumstances of the case. Such a question might arise not merely between husband and wife, but between father and child, sister and brother, and even between strangers in blood.

One of such cases was *Peakin* v. *Peakin* (1). There, W. Peakin (whose personal representative was the plaintiff) was the owner of a leasehold interest in a dwelling-house. He allowed the defendants, who were his sisters, to occupy the house, and they continued in occupation up to his death—a time sufficiently long to give them title under the Statutes of Limitation, if these applied. It was proved that W. Peakin paid the rent and taxes of the house and gave them a weekly allowance of meat and money for their support. He also executed repairs to the house. The plaintiff, as administrator, demanded possession of the house and, on the refusal of the defendants to leave, brought an ejectment. They set up the defence of the Statutes. At the trial, judgment was given for the defendants. The plaintiff moved to set aside the verdict and judgment, and that judgment be entered for plaintiff. The judgment of the Court was delivered by Andrews J., who held that the possession of the owner of the house continued notwithstanding the defendants' occupation and that their real position was that of guests, and that there never was any change in the nature of the occupation. He said that the question was entirely one of fact. Now, I by no means say that that case is on all fours with the present. There were circumstances in it which made the plaintiff's case a very strong one, viz.: the payment by the owner of the rent and taxes, the execution by him of repairs, and the weekly supply of meat and money. I only quote the case as showing that the question in such cases is one of fact to be decided on the evidence of circumstances.

I will refer to only one other case—*In re Maguire & M'Clelland's Contract* (2). There it was held on all the facts that possession did not give title against the rightful owners. I refer to it for the purpose of establishing that once the relation of principal and agent is shown in the original occupation, that relation will be held to continue in the absence of evidence that there was a change in the character of the occupier (see the judgment of Walker L.J.). Now, with these considerations in my mind I approach the facts of the present case. Peter Keelan (the owner and occupier of the farm in question) married Catherine Ward in February, 1897. They lived together on the farm, and I may presume that the wife assisted her husband, as the wives of small farmers generally do. The marriage did not turn out a happy one. In the language of the plaintiff, "he would not get leave to be happy." He departed from his home about nine months after the marriage, leaving his wife behind him in possession of the farm, and did not return

(1) [1895] 2 I. R. 359. (2) [1907] 1 I. R. 393.

to it or look after it in any way until he heard of his wife's death, which occurred on the 17th March, 1923. In fact, he completely effaced himself during his wife's life. These facts are consistent with more than one theory. One would be that he completely abandoned his wife and the farm, renounced his allegiance and duty towards his wife, and determined to let her fend for herself. Another would be, that finding it was impossible for himself and his wife to live together, he determined to separate from her, to make a provision for her during the period of separation, and that the best way to affect this was to go away himself and leave his wife in the occupation of the farm in order that she might have the means of support which he was bound in law to give her. If the parties were in a higher rank this would probably have been carried out by a deed of separation and a settlement of the farm on the wife during the joint lives or so long as she would remain separated from him. But these people were in a very humble rank of life, and people like them make arrangements in a very rough and ready way, and formalities are rarely observed. Now, if I find two theories, one of which can only be set up by imputing a flagrant disregard of all moral and legal duty, and the other consistent with what was both morally and legally right and proper to be done under the circumstances, I think that I am bound, unless there is coercive evidence to the contrary, to adopt the theory which is based on a recognition of legal obligation with due regard to the rights of the party discharging it. The obligation of the husband in the present case was to provide a home for his wife and to maintain her, and not to give her the farm absolutely. The marriage tie was not broken although there was a separation. He could not do better for his wife than to leave her in the occupation of his farm so that she might have a home with the means of support. He could do this without any change of ownership or without creating any tenancy or altering the legal possession. It would be quite enough to leave his wife to continue in the occupation which she already had, as his wife, but with no obligation to account for the profits of the farm. There was no necessity for accounting, because the farm was so small it must have been considered that it was only sufficient to provide a decent maintenance. I can find no reason at all for the theory of a change in the legal possession. The theory of a tenancy at will seems inconsistent with the husband's right of consortium which would entitle him at any time to enter without any previous determination of the tenancy. It would not be quite accurate to describe a wife living with her husband as his guest or as a licensee, but she is certainly not his tenant, and she has no independent possession. In the present case the wife had during the consortium no estate or interest of any kind in the land. There was not the least necessity for giving her any estate or interest for the purpose of carrying out the arrangement

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or understanding that she was to have means of support during the separation. For these reasons I cannot find that there was any change in the relationship so far as property is concerned which existed between the plaintiff and his wife while they co-habited.

No doubt, the long absence of the plaintiff and his complete omission to concern himself with his wife's dealings with the farm were points to be urged in favour of the theory that he completely abandoned his farm and that his wife ceased to occupy it as his representative, but I think that a change in an existing legal relationship should be clearly established, and the circumstances are not, in my opinion, conclusive. It is also to be remembered that there is evidence that after the separation the husband treated his wife as a mere agent or bailiff for him, because after departure he directed her to apply the profits in discharge of some debts he owed, and gave directions as to the treatment of the lands, directions which she appears to have recognized. It was not, then, the separation or the departure of the husband which changed the legal relationship. If these had not that effect, when did the change take place? The onus rested on the defendant to prove it, and I do not think that the onus has been discharged. No doubt, for a very long time he concerned himself in no way with either his wife or the lands. But from his point of view it may be asked what was the necessity? She was to have the entire profits during the separation for her support in discharge of his legal liability to maintain her. He was only concerned to see that the rent was paid, and he may have been satisfied that that would be done in her own interest.

But there is another aspect of this case. The wife became the purchaser of the farm under the Land Purchase Acts, and the lands were vested in her by vesting order dated 13th May, 1909. At that date the husband could not have lost his estate, because twelve years had not elapsed since he had left the farm. She therefore became the legal owner upon trust for her husband; and I always understood the law to be that the possession of a trustee so long as he carried out the trust is the possession of the cestui que trust. I think that the same principle is applicable to any person who is in possession of lands and uses them, or applies the rents and profits, according to the wish of the true owner. If the person in possession be not the legal owner he is acting as agent for the owner, but if he be the legal owner and acts according to the directions of the true owner he is a trustee. Now, no matter how the present case is regarded, there was an arrangement or understanding between the husband and wife that she was to have the use of the farm at least during separation or possibly for her life. By occupying the farm and appropriating the rents and profits she, as legal owner, who had become a trustee for the true owner under the Land Purchase Acts, was carrying out a trust

for him. There was no adverse possession, not using the word "adverse" in any technical sense, but in the sense of an independent, or separate, possession. The possession was for, not against, the owner, because the beneficial occupation was in accordance with an arrangement made by him with the person who had become the legal owner.

I now come to another chapter in the history of the case. On the 6th November, 1919, the wife made an application to the registering authority to discharge the note on the register, that the lands were registered subject to equities. That application was supported by a verified statement by the wife that her husband had left the lands in November, 1897, that he had not since been heard of, and was believed to be dead, and that she herself had been in sole and undisturbed occupation of the farm. On that statement the registering authority made certain requisitions. The first requisition was for the production of independent evidence as to occupation from 1890 to 1909 (which for the present purpose is immaterial) and as to the husband having gone away and not having been heard of. Then there was a query whether there were any children of the marriage. That was followed by this requisition: "Let the applicant make an affidavit that for twelve years at least no claim has been made by, or acknowledgment given, or payment made to any person in respect of the interests of Patrick Keelan (who was the father of Peter Keelan), or Peter Keelan." That was all, and I feel bound to say that these requisitions were wholly inadequate for the case. The object of the application, as most plainly appeared, was to bar absolutely all claims in respect of the estate of the applicant's husband; and one would think that the chief care of the registering authority would have been to see that all proper efforts had been made to give notice of the application to the husband if he were alive, and if he could not be found, to direct advertisements for him. Further, if the husband had died, which was the case made, and if he had died intestate, his next-of-kin would have had claims unless they were barred. One would think, then, that some requisition should have been made about them—who they were, where they lived, and as to notice being served upon them. But there was no such requisition—a most singular omission. Under the circumstances I can conceive the alacrity with which the wife made an affidavit in the exact words of the requisition calling on her to make an affidavit. A further affidavit was made by one Patrick Caragher, in compliance with the requisition to produce independent evidence. But there was nothing to show who Patrick Caragher was, or how he was independent. On this insufficient evidence the note as to equities was cancelled. I can only regard the whole proceeding as a most perfunctory performance, and I cannot avoid the conclusion that the registration was accomplished behind the backs of the only people who were concerned. In the interest of the public I

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feel bound to protest against the casual manner in which the proceeding was conducted. No counsel acting for a purchaser would have been satisfied with the evidence which was acted on. It is idle to say that the husband could not have been found. When the wife died he was very soon found by his sister. Putting the most charitable construction on the wife's conduct, she was at least guilty of a mistake which led to a miscarriage, and there is ample jurisdiction to order a rectification of the register. In my opinion the appeal should be allowed.

FITZGIBBON J.:—

I concur in the decision of the Court for the reasons stated in the judgment of the Chief Justice, which I have had the advantage of reading. I only desire to point out, in addition, that the decree from which this appeal was taken could not, in any event, have been sustained in its entirety. Its basis is the following passage (1) in the judgment of Molony L.C.J.:— "Of course in the majority of cases it may be difficult for a wife to prove that she had acquired a title in her husband's lands under the Statute of Limitations, but the evidence in this case is conclusive as to her exclusive possession and full beneficial enjoyment."

But by his will, Patrick Keelan, senior, amongst other bequests, declared a trust that "my wife, Catherine Keelan, to have full possession of the sleeping apartment at present occupied by her with the apartment immediately over it during her day, with the entire possession of a right to dispose in any way she chooses of the furniture and belongings of said sleeping apartment."

The existence and exercise of the rights conferred upon Catherine Keelan, senior, by her husband's will have been ignored, but upon the uncontradicted evidence she continued to enjoy them until her death in May, 1914, when the plaintiff's title to possession of that portion of the premises which had been bequeathed to his mother first accrued, and as this action was commenced in June, 1923, the defendant's testatrix could never have acquired a title under the statute to that part of the premises which had been bequeathed to her mother-in-law. But I am in entire agreement with the opinion of the other members of the Court that the statute never commenced to run at all in favour of the plaintiff's wife.

Solicitor for the appellant: *F. M. Duffy.*
Solicitor for the respondent: *Patrick Marron.*

C. L.

(1) [1924] 1 I. R., at p. 111.

IN THE MATTER OF THE ESTATE OF SIR E. C. NUGENT AND ANOTHER (1).

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June 13, 16. July 3.

Landlord and tenant—Land purchase—Whether lands subject to provisions of the Land Act, 1923—Holding occupied in connexion with demesne—Practice—Appeal—Time for appeal—Land Act, 1923 (No. 42 of 1923), sect. 24, sub-s. 2 (c), sub-s. 8—R.S.C., 1905, Or. 58, r. 15.

The time within which an appeal must be brought under sect. 24, sub-s. 8, of the Land Act, 1923, from an order of the Judicial Commissioner, refusing a declaration that a tenancy in certain lands is subject to the provisions of the Land Act, 1923, is regulated by Or. 58, r. 15, of the Rules of the Supreme Court, 1905, and not by any rule of the Land Commission.

Sub-s. 1 of sect. 24 of the Land Act, 1923, provides for the vesting of lands in the Land Commission on the appointed day, but the sub-section is not to apply (by sub-s. 2 (*c*)) to "any parcel of untenanted land which is a demesne ... or any holding usually occupied by a person in connection with such demesne." It was contended on behalf of a tenant that lands adjoining demesne lands, held under a contract of tenancy, had become part of the demesne, and also that the lands were tenanted demesne, and that, therefore, the lands were excluded from sub-s. 2 (*c*).

Held, that the tenant's contention was unsustainable, and that the lands were within sub-s. 2 (*c*).

Held also (by Kennedy C.J. and O'Connor J.) that, whether a particular holding is "a holding usually occupied by a person in connection with such demesne" within the meaning of sub-s. 2 (*c*), is a question of fact, and no appeal lies from the decision of the Judicial Commissioner under sub-s. 8 of sect. 24.

APPEAL under sect. 24, sub-s. 8, of the Land Act, 1923, from an order of Wylie J.

The report of the case in the Court below will be found in [1924] 1 I.R. 96.

The appeal was brought on behalf of the tenant, Lady Mowbray and Stourton, tenant for life, and on behalf of Colonel Edward Francis Farrell and the Rt. Hon. Anthony Robert Pyers, Viscount Southwell, as trustees of the estate of which the lands of Colvinstown form part, for an order that the order, dated 7th April, 1924, of Wylie J. herein, be reversed, and that it may be declared that the tenancy in the lands of Colvinstown, in the County of Meath, the subject-matter of the said order, be declared to be subject to the provisions of the Land Act, 1923.

On the hearing of the application before Wylie J. for the declaration that the tenancy in the lands of Colvinstown were subject to the provisions of the Land Act, 1923, a map was put in evidence showing the demesne and the holding, and illustrating the connexion between the two. The avenues from

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

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the mansion-house pass through the holding. The several leases under which the holding was held were also put in evidence and are referred to in the judgment of Kennedy C.J. The holding is at present held as a tenancy from year to year at £500 a year. The Poor Law valuation is £265 5s., the valuation of the buildings, £14. The further facts and the nature of the title to the lands are sufficiently stated for the purpose of this report in the judgment of Kennedy C.J.

Wilson K.C., for the respondents, raised the preliminary objection that the appeal was not in time. The order of Wylie J. was made on the 7th April, 1924. Notice of appeal should have been served within 21 days. The notice is dated the 8th May, 1924. [He referred to Order 58, rule 15, of the Rules of the Supreme Court, 1905, and to *A. H. Selwyn, Ltd.*, v. *Baker* (1).]

Jellett K.C. and *C. Roche*, for the appellant:—This is not an interlocutory appeal. It is a case in which the rights of parties under the Land Act of 1923 are finally decided. This is, therefore, a final appeal, and we are not bound by the rule applicable to an interlocutory appeal. Moreover, it is not to be assumed that the rules made under the Judicature Act apply to appeals from the Land Commission as regards the time for appealing. The Land Commission is a separate statutory Court, with its own rules, and it is these rules that regulate appeals from that Court.

KENNEDY C.J.—This is an appeal from an order of the Judicial Commissioner, and a preliminary point has been raised that the appeal has not been taken in time, on the ground that the appeal is one which is governed by Order 58, rule 15, of the Rules of the Supreme Court (Ireland), 1905.

The question turns on the fact that the proceeding before the Judicial Commissioner was an application for a declaration that the lands held by the tenant constituted a holding to which the Land Act, 1923, applies. The form of the order made by the Commissioner is one refusing the application. At the time when the application was made there was a rule of the Land Commission in force under the Act of 1923—a provisional rule in these terms:—"If, for the purpose of collection of compounded arrears of rent and payment in lieu of rent, a landlord or tenant requires a judicial declaration as to whether any particular holding is one to which the Land Act, 1923, applies, or does not apply, he may apply to the Judicial Commissioner for a declaration that the holding is, or is not, as the case may be, one to which the said Act applies; such application to be notified to the opposite party."

That rule, which came into operation on the 19th November, 1923, enables a party to apply, but does not prescribe the method

(1) [1924] W. N. 195.

of application. That was provided for by a later rule of the present year.

It appears that a practice grew up of making these applications by letter, and, in the present case, an application was made by a letter dated the 5th December, 1923, and that letter must be taken as an application within the Provisional Rules, i.e. that the holding is one to which the Act applies. That being so, there is an appeal from the decision on that question given by sect. 24, sub-s. 8, of the Act of 1923, which provides as follows:—"Any person aggrieved by a decision of the Judicial Commissioner on any question of law arising under this section may appeal from such decision to the Court of Appeal, but there shall be no appeal from any decision of the Judicial Commissioner on any question of price."

Mr. Herbert Wilson contends that the appeal under that sub-section is regulated by Order 58, rule 15, of the Rules of the Supreme Court of Judicature. Mr. Jellett argues that that Order does not apply, because, he says, the Land Commission is not part of the Supreme Court organization. I am of opinion that this appeal is governed by Order 58, rule 15, and that the particular clause relied on by Mr. Wilson, viz.: the part of the rule providing for the case of the refusal of an application, is the provision that governs the time within which the appeal should have been taken. It is not a question whether or not the determination of the Judicial Commissioner is in the nature of an interlocutory matter at all. I am, therefore, of opinion, and so hold, that this rule governs these appeals; but having regard to the fact that this was a new Act, and that provisional rules were drawn up which prescribed for such an application, but did not prescribe procedure, I am satisfied that in this case the time should be extended.

O'CONNOR J.—I concur.

FITZGIBBON J.—My only excuse—which, perhaps, is not a justification—for adding a few words is that we have been told by Mr. Jellett and Mr. Roche that on this question considerable doubt exists amongst members of the profession. I cannot see myself how the question of final or interlocutory appeal can arise in a case of this kind. There must be confusion between the question of the length of notice of an appeal and of the time within which notice must be given. It is on the question of length of notice that the difference between a final and an interlocutory appeal becomes material. That is regulated by Order 58, rule 3, and it provides that the length of notice from a final order shall be 14 days, and from an interlocutory order 4 days. But when one comes to the question of the period within which an appeal must be taken, there is no such distinction as final or interlocutory. In that case no appeal from any order in any matter not being an action shall, except by special leave, be brought after the expiration of twenty-one days, and no

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other appeal shall, except by such leave, be brought after the expiration of one year. The distinction between the two classes of orders, final and interlocutory, does not arise.

The only other case in which a distinction is drawn between final and interlocutory orders is that created by the Judicature Act itself, which provides that in the case of an appeal from a final order the Court must be constituted of three judges. We are now carrying on the business of this Court under the procedure which applied to the former Court of Appeal until rules of our own are made. That Court was a statutory Court, and Mr. Jellett contends that the Rules of the Supreme Court apply only to Courts set up by the Judicature Act. As a matter of fact, the Court of Appeal was given jurisdiction over many pre-existing Courts, and many appeals came to it from the Court of Bankruptcy, until, in 1897, the office of Judge of the Court of Bankruptcy was abolished, and that Court was united and consolidated with the Supreme Court. Similarly, in the case of the Court of Admiralty, there was a separate Court which made its own rules, but the rules under the Judicature Act governed the appeals from these separate Courts. It would be a strange thing if the Land Commission was to regulate the practice and procedure of this Court. We do not profess to make rules for the Land Commission, and the Land Commission has no power to make rules to govern our procedure. I concur in granting leave to appeal in this case, but in future it is to be understood that these appeals are regulated by Order 58, rule 15.

Wilson K.C.—I also take the point that this appeal is not competent—it being on a question of fact.

KENNEDY C.J.—We will hear Mr. Jellett before deciding that.

Jellett K.C.—Sub-s. 1 of sect. 24 of the Land Act, 1923, provides for the vesting of lands in the Land Commission on the appointed day, but this first sub-section is not to apply to "any parcel of untenanted land which is a demesne . . . or any holding usually occupied by a person in connexion with such demesne" by sub-s. 2 (*c*). This clause (*c*) first excludes a parcel of untenanted land which is demesne; therefore, a parcel of tenanted land which is demesne is not excluded. And this holding is tenanted land; therefore my client's holding being tenanted demesne is not excluded. Clause (*c*) also excludes "any holding usually occupied by a person in connexion with such demesne." We contend that this holding is demesne, and, therefore, it cannot be occupied "with such demesne," and is not excluded by clause (*c*).

We submit, therefore, that this holding is demesne, and that the land is tenanted demesne. What is demesne is discussed in *Magner* v. *Hawkes* (1). In the Land Act of 1896, as regards

(1) 32 L. R. Ir. 285.

demesne lands, there is no distinction as to tenanted or untenanted land, and in sect. 24, sub-s. 2 (*c*), of the Act of 1923 the only reference is to "untenanted" demesne.

Supreme Court. 1924.

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[The following authorities were also cited and discussed:—*Power* v. *Crosbie* (1); *Allen* v. *Grogan* (2); *Pratt* v. *Gormanstown* (3); *O'Ferrall* v. *Quirk* (4); *Moonan* v. *Conyngham* (5).]

Wilson K.C.—I submit that the construction put upon sub-s. 2 (*c*) of sect. 24 of the Land Act, 1923, by Wylie J. is the correct one. Prior to the 9th August, 1923, the date of the passing of the Act, the appellant had no right whatever. When the Act was passed the tenant thought she could take advantage of it. But the Act is a Land Purchase Act and nothing else. It has nothing to do with fixing fair rents. The policy of the Act was to vest all tenanted land in the Land Commission on an appointed day. The meaning of the exception in sub-s. 2 (*c*) can be gathered by considering the other exceptions in sub-s. 2.

Cur. adv. vult.

July 3.

KENNEDY C.J.:—

This is an appeal from an order of Mr. Justice Wylie refusing an application made to him by the appellant, Lady Mowbray and Stourton, for a declaration that certain lands held by her from the respondents, Sir E. C. Nugent and Mrs. Banks, constitute a holding to which the Land Act, 1923 (No. 42 of 1923), applies.

The lands, the subject of the application, were originally demised by an indenture of lease dated the 1st October, 1807, from Sir George Nugent and Charles Edmund Nugent to Elias Corbally for a life in being, or thirty-one years, at the yearly rent of £395 13s. 9d. sterling. They are described in the lease as "the lands of Colvinstown, in the County of Meath, containing by estimation 172 acres and six perches," excepting and reserving to the landlords all mines and minerals and all timber, trees, woods, and underwoods at any time during the demise upon the premises. The lease contains a covenant against alienation.

The term of years in the lease of 1807 having expired, a new lease of the premises was, on the 1st June, 1867, made by Dame Georgina Charlotte Manningham Buller and Charles Edmond Nugent to Matthew Elias Corbally, who was the life in the lease of 1807, and was then possessed of the lessee's interest therein, for a term of forty-one years at the yearly rent of £500. The lands are described as containing 278 acres Statute measure. This lease contains a recital that Matthew Elias Corbally had from time to time planted various parts

(1) 35 Ir. L. T. R. 49.
(2) 32 L. R. Ir. 179, at p. 183.
(3) [1894] 2 I. R. 279, 557.
(4) [1895] 2 I. R. 197.
(5) [1895] 2 I R. 1.

Supreme Court. 1924.

In re NUGENT'S ESTATE.

Kennedy C.J.

of the lands with plantations of timber and had registered the same as required by law. A proviso follows preserving, during the continuance of the demise, the right of Corbally to the trees and plantations so planted and registered. The lease contains a covenant against alienation and a covenant not to plough up any part of the demised meadow and a covenant to "occupy the said farm and lands hereby demised as a Grass Farm only."

The second lease has also expired, and the premises appear to have continued in the possession of the tenant under a tenancy from year to year. The appellant is stated to hold the tenant's interest as tenant for life under her family settlements, the trustees of which, Colonel Edward F. Farrell and Viscount Southwell, join her in this appeal.

The lands of Colvinstown immediately adjoin, on the east side, the fee-simple demesne lands of Corbalton, upon which stands the mansion-house of Corbalton Hall. The appellant is also tenant for life of the fee-simple demesne and mansion-house. A main road runs from north to south through the Colvinstown holding. At some time—we are not told when—two avenues were made to connect the mansion on the demesne with this main road at two well-separated points at each of which there appears to be a gate lodge. Each of the avenues runs for part of its way through the demesne land and for part of its way through the holding. It is alleged, in argument for the appellant, that the mansion-house and demesne would be without an outlet but for these two avenues. It is urged that the plantations on the holding are a continuation of the plantations on the demesne lands, part of a single scheme. A map was put in evidence (part of the ordnance sheet marked) which is relied on as showing that the mapper found the part of the holding east of the main road to be one with the demesne lands. A witness was examined before Wylie J. as to the condition of the holding and its physical connexion with the demesne.

In that state of facts, the case made by the appellant before Wylie J. was that the Colvinstown holding was within the operation of sub-s. 1 of sect. 24 of the Land Act, 1923 (No. 42 of 1923), and that it was not excluded by the only relevant exception, namely, that in sub-s. 2 (*c*) of the same section, the contention being that the Colvinstown holding is not a "holding usually occupied by a person in connexion with such demesne," for it is argued that it has, or at least the part of it east of the main road has, become incorporated in the demesne, and, therefore, that it is part of a demesne and not merely "occupied in connexion with" a demesne; and it is urged that tenanted demesne is not within the exception.

Wylie J., in refusing the application grounded upon the aforesaid evidence and arguments, made a clear and unequivocal determination that the Colvinstown holding "is a holding usually

occupied by a person in connexion with a demesne, and therefore excluded by the second branch of sub-s. 2 (*c*) of sect. 24." (1)

This appeal is taken under sub-s. 8 of sect. 24 of the same Act, which provides that "any person aggrieved by a decision of the Judicial Commissioner on any question of law arising under this section may appeal from such decision to the Court of Appeal."

Mr. Herbert Wilson, for the respondents, at the outset took the objection that the decision of the Judicial Commissioner was one of fact and not of law, and that, therefore, no appeal lay.

The only question of law which emerges from Mr. Jellett's argument for the appellant comes to this: He says that there is a distinction between a holding "usually occupied by a person in connexion with a demesne" and a holding so occupied by a person as to become demesne land, or incorporated in a demesne, and that the latter type of holding does not come within the terms of the exception in sub-s. 2 (*c*) of sect. 24 of the Act. He relies on *Magner* v. *Hawkes* (2), and says that the Colvinstown holding has been "demesned" by user, and is now tenanted demesne, and, as such, outside the exception clause.

In my opinion, the argument of Mr. Jellett introduces into the clauses a qualification, a limitation on its operation, for which no support can be found in the words of the clause or in the Act. To give effect to the argument it is necessary to construe the clause as if it read—"a holding (not being a holding comprising demesne land) usually occupied by a person in connexion with such demesne, but not so used or occupied as to become demesne land or incorporated in such demesne." This is very subtle and very ingenious, but it is not the Act. In the absence of anything in the Act to support it, we must reject the contention.

We are then left with the very simple words of the clause, and the simple issue they raise, which is clearly a question of fact, namely: Is the holding one which is usually occupied by a person in connexion with such a demesne as is mentioned in the first limb of the clause? Wylie J. has determined that question in the affirmative, and from that determination no appeal is given.

I am of opinion that this appeal should be dismissed.

O'CONNOR J.:—

The question in dispute in this case is whether a parcel of land held under a contract of tenancy comes within sub-s. 2 (*c*) of sect. 24 of the Land Act, 1923. This parcel of land adjoins the demesne of Corbalton, and since the year 1807 has been held and enjoyed by the owners of the demesne. Portion of the land has been in fact incorporated with the demesne. At least two drives from the public road to the mansion-house have

(1) [1924] 1 I. R., at p. 97. (2) 32 L. R. Ir. 285.

Supreme Court. 1924.

In re NUGENT'S ESTATE.

O'Connor J.

been constructed through part of the lands, and gate lodges (with, I presume, more or less ornamental gates) have been made on the lands at the entrances. Moreover, that portion of the lands which adjoins the demesne has been planted with timber, which I will assume is ornamental. Physically, part of the lands may be, to all intents and purposes, undistinguishable from the demesne of Corbalton. But, admitting all this, I cannot see how this parcel of land can be taken out of the sub-section. It is certainly a "holding"—being land held under a contract of tenancy. It has certainly been usually occupied with the demesne. The fact that it has become, so to speak, incorporated with the demesne is the strongest evidence that it has been, and is usually, occupied with it.

I see no ground for reversing Mr. Justice Wylie's order. I wish also to say that in my opinion the question involved is purely one of fact from which no appeal lies.

FITZGIBBON J.:—

The only question of law raised by Mr. Jellett was whether, under sect. 24, sub-s. 2 (*c*), of the Land Act, 1923, land which had been incorporated in a demesne, but in respect of which there was an agreement for a tenancy, was excluded from the operation of the Act. The case before us seems to me to be precisely the kind of case which was in the contemplation of the framers of the section. It is quite clear that any parcel of untenanted land, which is demesne, and any holding, whether it be demesne or not, which is occupied in connexion with a demesne is excluded by sect. 24, sub-s. 2 (*c*).

Solicitors for the landlord: *Baker, Ringwood, & Gordon.*
Solicitors for the tenant: *Roche & Sons.*

H. J. M'C.

IN THE MATTER OF THE COMPANIES (CONSOLIDATION) ACT, 1908, AND IN THE MATTER OF SAMUEL HOLMES, LIMITED.

Murnaghan J.
1924.
Nov. 10.

Malicious injury to property—Compensation—Conflicting claims—Claim by owner and by equitable mortgagee.

M. H. deposited the title deeds of a certain property with a bank in November, 1918, to secure an advance to her by the bank. Malicious injury was done to the property; and in November, 1920, M. H. was awarded compensation therefor by the Recorder of Dublin. The Recorder's decree was subsequently reviewed by the Compensation (Ireland) Commission, and the amount awarded by the Recorder was reduced. In 1919 M. H. signed a guarantee with the same bank for her husband's account. In September, 1921, the husband of M. H. formed a company, and in November, 1921, M. H. agreed to sell the property to the company in consideration of the allotment to her of certain shares in the company. The company was subsequently wound up on the petition of the bank, as debenture holders, and an Official Liquidator was appointed. The compensation awarded by the Compensation (Ireland) Commission was paid to the Official Liquidator, and both M. H. and the bank claimed the money.

Held, that compensation awarded by the Compensation (Ireland) Commission was in the nature of damages obtained from the wrongdoer, and the bank as mortgagees had no claim to it.

SUMMONS.

A petition to wind up the company, "Samuel Holmes, Limited," was presented on the 18th March, 1922, by the Munster and Leinster Bank, Limited, as debenture holders, and on the 25th April, 1922, the Court ordered that the company be wound up. Mr. David Telford was, on the 24th May, 1922, appointed official liquidator. The summons was brought on behalf of the official liquidator for directions as to whether the sum of £42 19s. 8d., compensation, interest, and costs, awarded under a decree dated 3rd November, 1920, obtained by Mrs. Margaret Holmes in respect of malicious injury to fences on the lands of Mount Dillon, was properly payable to her or to the Munster and Leinster Bank, Limited, both parties claiming to be entitled to the same.

Mrs. Margaret Holmes had lodged a claim for malicious injury to fences, which were on her property at Mount Dillon, and her claim was heard by the Recorder of Dublin, who, on the 3rd November, 1920, awarded her the sum of £75 for compensation and £11 19s. 5d. for costs. This decree was subsequently reviewed by the Compensation (Ireland) Commission (popularly known as the "Shaw Commission," Lord Shaw of Dunfermline being its first chairman, and is so referred to in the judgment of Murnaghan J. (1).) This Commission

(1) The warrant of appointment of the Compensation (Ireland) Commission containing the powers and duties of the Commission will be found set out in Bolton's "Criminal Injuries" (Ir.) Acts, 1919 and 1920," 5th edit., p. ix.

Murnaghan J. 1924.

In re Holmes, Limited.

reduced the award to £30 for compensation and £12 10s. for costs, with interest from 1st January, 1923. The total amount subsequently received by the Official Liquidator in respect of the claim and costs was £42 19s. 8d. Mrs. Holmes claimed to be paid this amount on the ground that she had repaired the fences, and expended the money in doing so. The solicitor for the Official Liquidator stated in his affidavit that he had communicated with the solicitors for the Munster and Leinster Bank, Limited, who were debenture holders, and would not be fully paid off, informing them of the claim of Mrs. Holmes; that the bank's solicitors wrote in reply that the bank could not admit the claim of Mrs. Holmes; on the contrary, the bank claimed the money. They also stated that the deeds of Mount Dillon had been deposited with the bank on the 26th November, 1918, nearly two years prior to the Recorder's decree, and on the 23rd May, 1919, Mrs. Holmes had signed a guarantee for the account of Mr. Samuel Holmes (her husband). That under these circumstances the bank claimed the money, and requested that the liquidator should not part with it except to the bank. The solicitor for the liquidator also stated in his affidavit that the company (Samuel Holmes, Limited) was incorporated on the 30th September, 1921; that the lands of Mount Dillon, which were subsequently directed to be sold in this matter, were originally the property of Mrs. Holmes, and when the company was formed, she, by an agreement dated the 4th November, 1921, agreed to sell to the company the said property of Mount Dillon in consideration of the allotment to her of 2,000 fully paid-up preference shares in the company.

A member of the firm of solicitors for the bank, in an affidavit, stated that the bank had been obliged to buy in the house and lands of Mount Dillon at the sum of £2,000, and that he had frequently visited the premises; that the fence, the subject of the compensation decree, which Mrs. Holmes said she had repaired, was in a most dilapidated condition and was in a total state of disrepair, and cattle from an adjoining field had been trespassing on the lands in consequence; that he had to get estimates for a completely new fence. In a replying affidavit Mrs. Holmes stated that she had had the damage to the fences repaired, and the fence was in perfect condition when the premises were sold; that a representative from the Shaw Commission had attended at Mount Dillon, and inspected the fence, and saw that same had been restored and was in perfect condition, and had awarded her £30 as compensation for the work she had done.

James Henry, for the Official Liquidator.

Dickie K.C., for Mrs. Holmes:—

An equitable mortgagee has no such interest in the lands as would enable him to claim this money. The bank could not

have compelled Mrs. Holmes to apply for compensation, nor could they insist on the compensation being spent on the premises. But the question whether the compensation had been spent or not has nothing to do with the legal position. The nearest analogy to this case is that of money paid under an insurance policy. In *Lees* v. *Whitely* (1) Kindersley V.-C. held that even a legal mortgagee could not claim the amount paid under an insurance policy to the mortgagor in the absence of an express covenant.

H. Vaughan Wilson, for the Munster and Leinster Bank, Limited:—

The compensation money is an accretion to the security, and the bank, as equitable mortgagees, are entitled to it. In *Law Guarantee and Trust Society, Limited*, v. *Mitcham and Cheam Brewery Co., Limited* (2), it was held that where a company had specifically mortgaged leaseholds to trustees to secure debenture stock, the trustees were entitled to receive the compensation money awarded to the company under the Licensing Act, 1904, in respect of the refusal of the licensing authority to renew the licence of a leasehold beer-house included in the security.

MURNAGHAN J.:—

Mr. Vaughan Wilson has based the claim of the equitable mortgagee to the compensation money on the ground that the compensation money is an accretion to the security, and that the equitable mortgagee is entitled to have such benefit. He has cited the case of *Law Guarantee & Trust Society, Limited*, v. *Mitcham & Cheam Brewery Co., Limited* (2), in which it was held that a mortgagee was entitled to compensation money paid in respect of the withdrawal of a license from licensed premises under an English Act providing for the reduction of the number of licensed premises. Mr. Dickie has denied the application of this case, and points out that under the statute involved in that case the compensation money was to be paid to the parties entitled.

Mr. Dickie, on the other hand, relies upon the analogy of cases decided in respect to insurances of mortgaged property where it has been held that an insurance of property, which is subject to a mortgage effected by the mortgagor, does not enure for the benefit of the mortgagee.

In my opinion neither of these analogies can be relied upon as a guide in the present case.

(1) L. R. 2 Eq. 143. (2) (1906) 2 Ch. 98.

Murnaghan J. 1924.

In re HOLMES, LIMITED.

The compensation awarded by the Shaw Commission is, in my opinion, in the nature of damages obtained from the wrongdoer. An equitable mortgagee by deposit could not have sued a wrongdoer and recovered damages for injury to the property. I can find no principle of equity under which the bank in the present case are entitled to this money. There is a controversy in point of fact as to whether the owner repaired the fence. This question does not, in my opinion, arise. If the money was to be spent as a condition precedent to obtaining the grant, the Shaw Commission must have been satisfied that it was so spent. If the money, on the other hand, was not so spent, in my opinion, for the reasons stated, the bank, as holders of the title deeds, have no claim to the money.

Solicitor for the liquidator: *S. G. Rutherford.*
Solicitors for Mrs. Holmes: *Gerald Byrne & Co.*
Solicitors for the Munster and Leinster Bank: *Maxwell, Weldon, & Co.*

R. R.

IN THE MATTER OF THE TRUSTS OF THE WILL OF ANNE MINA FREEMAN, DECEASED; CONYNGHAM *v.* TRIPP AND OTHERS.

Murnaghan J.
1924.

Dec. 2,19.

Will—Construction—Gift to daughters and their children—Gift over in event of daughters dying without leaving issue surviving—Concurrent gift—Gift in succession—Personalty—Exclusion of rule in Wild's Case.

Testatrix, who died possessed of real and personal estate, by her will gave and bequeathed certain houses to trustees upon trust to apply the rents and profits for the maintenance of her children until her sons attained age or obtained suitable employment (which events happened), and then "in trust as to all my said property for my three daughters equally, share and share alike, and their children respectively, and from and after the death without leaving children surviving of all or any of my said daughters then, as to the share or shares of such of my said daughter or daughters so dying without issue aforesaid," in trust for her sons. At the time the testatrix made her will her three daughters were unmarried. After the death of testatrix two married and had issue, and the third died unmarried. For the purpose of making title on a sale of portion of the property (a house held for a term of years), it was necessary to determine the interests of the two married daughters therein.

Held, that the will showed a sufficient intention on the part of the testatrix that each daughter and her children should take in succession, and not concurrently.

And as there was a sufficient indication of the intention of the testatrix that the children of each daughter should take in succession to their mother, there was nothing in the rule in *Wild's Case*, 6 Rep. 16 *b*, which made it impossible to carry out that intention. And even if the context did not show that the children were to take in succession, the weight of authority was against the application of the rule in *Wild's Case* to personalty.

In re Jones, Lewis v. *Lewis*, [1910] 1 Ch. 167, discussed.

SUMMONS.

Anne Mina Freeman, by her will, dated the 26th day of May, 1874, gave and bequeathed certain houses and premises, which were held for freehold and chattel tenures, to two trustees, upon trust from and after her decease to apply the rents and profits as her trustees should think fit for the maintenance and education of her three daughters, Sophia, Catherine Maria, and Eveline, and her sons, William Henry Freeman and George Freeman, until her said sons should have attained the age of 21 years, or have obtained some situation or employment which, in the opinion of her trustees, should be sufficient for their maintenance, and from and after either of said events, or in case of the said William Henry Freeman's death and George Freeman's death under the age of 21, then "in trust as to all said property for my said three daughters, Sophia, Catherine Maria, and Eveline Freeman, equally, share and share alike, and their children respectively, and from and after the death without leaving children surviving of all or any of my said daughters, then, as to the share or shares of such of my daughter or daughters so dying without issue as aforesaid, in trust for my three sons, Samuel, George, and William Henry, equally, share and share alike, with cross remainders between them both as to their original and any accrued share or shares."

Murnaghan J. 1924.

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Anne Mina Freeman died on the 1st November, 1874, leaving six children her surviving. Sophia Freeman married in the year 1881 George H. Tripp, and there were four children of the marriage. Charlotte Eveline Freeman married Henry Daniel Risbee in the year 1889, and there were three children of the marriage, one of whom died an infant and unmarried. The third daughter, Catherine Maria, died on the 10th June, 1905, a spinster, and at her death one-third share of the rents and profits were received by her brothers, who had reached the age of 21 years.

Portion of the real property left by the said Anne Mina Freeman to her children was taken by the Great Southern and Western Railway Company of Ireland, and the purchase money was paid into Court; and by order of Sir Andrew Porter M.R., dated February 26th, 1906, investments representing the sum paid in were allocated, and one-third was transferred absolutely to each of the defendants, Sophia Tripp and Charlotte Eveline Risbee, respectively, and the remaining one-third was divided among their brothers (1).

For the purpose of making title to a purchaser on a sale of portion of the property which was held for the unexpired residue of a term of 999 years, the surviving trustee issued a summons to determine the interest taken by each of the daughters, the questions for determination of the Court being as follows:— 1. Whether, on the true construction of the said will, and in the events which have happened, does each of the defendants, Sophia Tripp and Charlotte Eveline Risbee, take absolutely one undivided third of the said property? 2. Does each of the said defendants take an interest for her life in one undivided third of said property? 3. What interest, if any, have the children of the said two defendants respectively in the said property?

Macrory, for the defendants, Sophia Tripp and Charlotte Eveline Risbee:—

The gift to each daughter and her children is a gift to the class comprising the daughter and her children, and as there were no children at the date of ascertaining the class, each daughter takes one-third absolutely, subject to the gift over if she dies without leaving children surviving: Hawkins on Wills, 2nd edit., p. 244. The gift of the real estate devised by the will is within *Wild's Case* (2); and Porter M.R. paid moneys out of Court (1) in a manner which can only be justified on the basis that *Wild's Case* (2) applied to the same. If *Wild's Case* (2) applies to the realty, the bequest of the leaseholds cannot be interpreted as a gift to the parent for life, with remainder to the children: see observations of Joyce J. in *In re Jones, Lewis* v. *Lewis* (3). [He also cited *Newill* v. *Newill* (4).]

(1) Not reported.
(2) 6 Rep. 16 *b*.
(3) [1910] 1 Ch. 167.
(4) L.R. 7 Ch. App. 253.

Ryland, for the defendants, the children of Sophia Tripp and Charlotte Eveline Risbee :—

Murnaghan J
1924.
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The testatrix plainly intended that the daughters and their children should take in succession: *In re Jones*; *Lewis* v. *Lewis* (1). The rule in *Wild's Case* (2) has no application. In *In re Jones*; *Lewis* v. *Lewis* (1), it was laid down that where the gift to the children would, without reference to the rule, be a gift in succession to, and not concurrently with, their parent, the rule does not apply. In any event, *Wild's Case* (2) only applies to real estate. There are three constructions of a gift to parents and children. They may take jointly, or the parents may take absolutely, or the parents may take life interests, with remainder to the children. Here the intention was to benefit daughters and issue, but not in equal shares, and the gift over shows that the testatrix contemplated life estates in certain circumstances. The rule in *Wild's Case* (2) was intended to benefit children; but if applied to the present case, it would have the contrary effect, and defeat its own object.

Cur. adv. vult.

Dec. 19.

MURNAGHAN J. :—

In this case a point of construction arises upon the will of Anne Mina Freeman, dated the 26th of May, 1874, the question being, whether a gift to the daughters of the testatrix and their children with a gift over in the event of the daughters dying without leaving children surviving, was a concurrent gift to the daughters and their children, or whether the daughters and their children take in succession.

The material words of the will are as follows:—[His Lordship read the will.]

At the time the testatrix made her will her three daughters Sophia, Catherine Maria, and Charlotte Eveline were unmarried. Testatrix died on 1st November, 1874. The premises mentioned in the title of the summons are held for the unexpired residue of a term of 999 years. The daughter of testatrix, Sophia, married in the year 1881 George H. Tripp, and there are four children of the marriage. Another daughter, Charlotte Eveline Freeman, intermarried with Henry Daniel Risbee in the year 1889, and there were three children of the marriage, one of whom has died an infant and unmarried. The third daughter, Catherine Maria Freeman, died on 10th June, 1905, a spinster, and since her death one-third share of the rents and profits has been received by her three brothers.

For the purpose of making title on a sale to a purchaser, it has become necessary to determine what are the respective interests of Mrs. Sophia Tripp and Mrs. Charlotte Risbee in the premises in question. I should state that the case has been argued before me on the assumption that William Henry and George Freeman attained the age of 21, or that their interest

(1) [1910] 1 Ch. 167. (2) 6 Rep. 16 *b*.

Murnaghan J. 1924. CONYNGHAM v. TRIPP.

in the premises determined before there was issue of the marriage of Mr. and Mrs. Tripp. It has also been agreed—and I am of opinion that the view is the correct one—that the gift in trust "for my said three daughters, Sophia, Catherine Maria, and Eveline Freeman equally, share and share alike, and their children respectively" must be read as a gift of one-third share to each daughter and her children.

Mr. Macrory, on behalf of Mrs. Tripp and Mrs. Freeman, contends that the gift to each daughter and her children is a gift to the class comprising the daughter and her children, and that, as there were no children at the date of ascertaining the class, each daughter takes one-third absolutely, subject to the gift over if she dies without leaving children surviving. Mr. Ryland, on the other hand, contends that it can be collected from the will that the testatrix intended the daughters and their children to take in succession, and he relies upon the decision of Mr. Justice Joyce in *In re Jones*; *Lewis v. Lewis* (1). Mr. Macrory admits that this decision is hostile to his contention, but disputes the basis upon which this decision is reached.

The authorities clearly establish that a gift to *A* and her children creates a joint tenancy between parent and children unless the intention of the testator can be shown to contemplate interests in succession: *Newill* v. *Newill* (2). In a case in this country, *Mill* v. *Mill* (3), Lord Chancellor Ball, in reviewing a decision of the Master of the Rolls, said: "It is said that he (the Master of the Rolls) should have decided that the widow and her children took as joint tenants; and there is no doubt that if there had been merely a gift to the widow and her children or to the widow in trust for herself and her children . . . there is authority for holding their interest to be of this character. But it is equally settled by authority that other provisions in the will from which an indication of intention that the parent and children should not take jointly may be inferred—even although such indication may, in the language of Lord Cottenham, be very slight, or be founded, in the language of Lord Hatherley, upon small circumstances—will induce the Court to interpret the bequest into the gift of a life estate to the widow, with remainder to her children." In *In re Jones*; *Lewis* v. *Lewis* (1) Mr. Justice Joyce quotes with approval the statement of the law in Hawkins on the Construction of Wills (4): "It is conceived that, notwithstanding these cases, the rule as at present established requires some aid from the context to convert the gift to the children into a gift in remainder, and that, without such aid, the force of the expressions themselves is to cause the parent and children to take concurrently. The opposite rule, however, if established, would

(1) [1910] 1 Ch. 167. (2) L. R. 7 Ch. App. 253. (3) Ir. R. 11 Eq. 158.
(4) Hawkins on Wills, 2nd edit., p. 245. This paragraph formed portion of Appendix II to the first edition of that work.

no doubt be a convenient and probably beneficial rule of construction."

Is there anything in the context of the will to show that the testatrix intended interests in succession rather than concurrently? The gift is "for my three daughters . . . equally, share and share alike, and their children respectively, and from and after the death without leaving children surviving of all or any of my said daughters, then as to the share or shares of such of my said daughter or daughters so dying without issue as aforesaid," over. In my opinion, that which is given over is the one-third share first given to each daughter and her children; and such one-third share can only be intended to be given over if it is kept undivided during the daughter's life, for if the share had vested in a daughter and her children as joint tenants, and the interests subsequently became severed, it cannot be presumed that the children's shares which might have been dealt with were to go over on the daughter subsequently dying without children her surviving. It seems to me that the gift over of the entire share is inconsistent with a joint tenancy in the daughter and her children, and it is a fallacy to say that, because in the present case there were no children, the gift over could take effect. The *ratio decidendi* of Mr. Justice Joyce in *In re Jones*; *Lewis* v. *Lewis* (1) is based on the view that the whole original share of the parent in the case of each of the testator's children is dealt with, or is contemplated as still subsisting as undivided at the death of the child.

There is another element which has been taken into consideration in several cases although it is not derived from the context of the will but rather from the facts known to the testator when he made his will. At the making of the will by testatrix her daughters were unmarried. In *Crone* v. *Odell* (2), in the House of Lords, Lord Eldon, dealing with the construction of a will, said: "But it was difficult to believe that he, having a daughter unmarried, could really mean that those only should take who were born before his death, and that this was a devise to them *in presenti*." Again, in *Audsley* v. *Horn* (3), heard on appeal, Lord Chancellor Campbell said: "The contention, that under a bequest of personalty 'to Amelia Rossiter and Amelia Rossiter's children, but if they should die without issue then over,' Amelia Rossiter takes an absolute interest, having been an unmarried woman at the making of the will and at the testator's death, and having no child born at the expiration of the prior life estate, is certainly very startling, and seems at variance with the expressed intention of the testator. Although Amelia was unmarried when he made his will and when he died, he might not unnaturally wish to make

(1) [1910] 1 Ch. 167. (2) 3 Dow 61, at p. 71.
(3) 1 De G., F. & J. 226, at p. 235.

Murnaghan J. 1924. CONYNGHAM v. TRIPP.

some provision for her children if she should grow up, marry, and have children. It is quite clear that he intended her children to take a benefit; and he contemplated that this might be after the death of their mother." The remarks of Mr. Justice Joyce in *In re Jones*; *Lewis* v. *Lewis* (1): "Now, *a priori* it is in the highest degree improbable, if not impossible, that a rational testator should give or devise property to a child and his or her children as a class or so as to make them take not in succession, but concurrently," are too wide, in my opinion, having regard to the decided cases, but are quite in accordance with the experience of other learned Judges if applied to a child unmarried at the date of the will. For, as Lord Campbell points out in *Audsley* v. *Horn* (2), if the gift is a joint gift, it in many cases deprives the children of any share in the property, contrary to the testator's intention, *ex gr.*, if there are no children at the date of the death or other period for ascertaining the class.

Having formed the opinion that there is, upon the context of the will, sufficient indication of the intention of the testatrix that the children should take in succession to their mother, there is nothing in the rule of law known as the rule in *Wild's Case* (3) which makes it impossible to carry out the intention. This rule is stated, at 6 Rep. 17, thus: "And therefore this difference was resolved for good law, that if *A* devises his lands to *B* and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation." And later in the Report: "But it was resolved, that if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in this case, although they have not any child at the time, yet every child which they shall have after, may take by way of remainder, according to the rule of the law; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife." Even if the context did not show that the children were to take in succession, the weight of authority is against the application of the rule in *Wild's Case* (3) to personalty, because the application of the rule in the case of personalty would defeat the object of the rule, there being no estate tail in personalty. See Lord Campbell's remarks in *Audsley* v. *Horn* (4) on the judgments in *Stokes* v. *Heron* (5).

(1) [1910] 1 Ch. 167, at p. 172.
(2) 1 De G. F. & J. 226, at p. 235.
(3) 6 Rep. 16 *b*.
(4) 1 De G., F. & J. 226, at p. 236.
(5) 12 Cl. & F. 161.

I have been referred to an order of the Master of the Rolls, dated 26th February, 1906, made in the application of George Henry Tripp, Sophia Tripp, Charlotte Eveline Risbee, Samuel Freeman, George Freeman, and William Henry Freeman, whereby the sum of £233, new consols lodged in Court under the Railways (Ir.) Acts, 1851 to 1860, in respect of freehold lands at Drumcondra was paid out of Court as to one-third to Mrs. Sophia Tripp, one-third to Mrs. Risbee, and the remaining third to Samuel Freeman, George Freeman, and William Henry Freeman. The children of Mrs. Tripp and Mrs. Freeman were not parties to the application, and I cannot regard this order as in any way determining the rights of the parties upon the present application.

The answer to Question No. 1 will be "No," and the answer to Question No. 2 will be "Yes." As to No. 3, the gift over is, in my opinion, to the children surviving their respective parents, but it is premature to make any answer to this question.

Solicitors for the defendants, Sophia Tripp and Charlotte Eveline Risbee: *H. & W. Stanley.*

Solicitors for the defendants, the children of Sophia Tripp and Charlotte Eveline Risbee: *Wm. Fry & Son.*

R. R.

Murnaghan J.

1924.

Dec. 1, 2.

M'KINLEY *v.* KENNEDY.
(1924. No. 247.)

Judgment Mortgage — Estate or interest in land — Lands specifically bequeathed to judgment debtor — Testator's estate insolvent — Lands specifically bequeathed to debtor assigned in trust for debtor—Whether debtor had any interest in lands at the date of registration of judgment mortgage—Interest subsequently acquired not bound—Judgment Mortgage Act, 1850 (13 & 14 *Vict. c.* 29), *sects.* 6 *and* 7.

Plaintiff obtained a judgment against the defendant on 19th July, 1922, and on 3rd August, 1922, registered it under sect. 6 of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), against the interest of the defendant in certain premises. Defendant's husband had specifically bequeathed to her these premises, being the house and premises in which they were living at the time of his death in 1915. Defendant was one of the two executors of her husband's will, and both executors proved the will. After her husband's death, defendant continued to reside at the house. In 1916 an order for the administration of the estate of the defendant's husband was made, and it was found that the house and premises were personal estate outstanding or undisposed of, and that the estate was insolvent. In 1923 the Court gave liberty to the executors to assign the house and premises to F. I. in trust for the defendant, F. I. undertaking to pay all arrears of rent, and to guarantee the payment of the future gales of rent. Plaintiff contended that he was entitled by reason of his judgment mortgage to have the interest of the defendant in the premises under the order made in 1923, and the assignment made under it, sold in order to realise the amount of his judgment:

Held, that as the defendant had lived in the house and premises and enjoyed the profits thereof for several years she must be taken to have assented to the specific bequest of the premises to herself, and that from the date of her husband's death in 1915 to the date of the order for administration in 1916, defendant was in the position of a specific legatee who had obtained the assent of one of the executors to the bequest. But that, inasmuch as the creditors had a right to resort to any portion of the deceased's estate including specific bequests, they could have sold the premises instead of assigning them under the order of 1923 to F. I. for the benefit of the defendant as they had done; any interest which defendant might possibly have had ceased at the date of the making of the order of 1923, as the result was the same as if the creditors had realized the premises by sale and disposed of the proceeds. And as the only interest which the defendant had in the premises was the contingency of her husband's estate being sufficient to pay his debts without resort to the specific bequest, or, if that were resorted to by the creditors, the right of recoupment against the estate not specifically bequeathed, the plaintiff's judgment mortgage did not affect any beneficial interest vested in the defendant.

It was contended on behalf of the plaintiff that if the defendant had an interest, however slight it might be at the date of the registration of the judgment mortgage, the effect of the Judgment Mortgage Act was to bind her present interest in the premises although subsequently acquired.

Held, that the defendant had no interest upon which the statute could operate, but that even if she had in law some interest at the date of the registration it would not bind an interest subsequently acquired.

Section 7 of the Judgment Mortgage Act, 1850, must be construed as limited to the estate or interest of the debtor at the date of the registration of the judgment mortgage.

SUMMONS.

By his will, dated September 12th, 1914, Frederick Kennedy, who died on March 1st, 1915. after appointing George Hubert

Kennedy and his wife, Mary Elizabeth Kennedy (the defendant), executors, and, after the bequest of several legacies, bequeathed to his wife "the dwelling-house and premises wherein I at present dwell at Frascati, Blackrock, in the County of Dublin, together with everything in said house and premises." The will was duly proved, and the defendant continued to reside in the house, and to receive the rents and profits of the premises. On June 26th, 1916, an order was made for the administration of the estate of Frederick Kennedy at the suit of a creditor, and it was found to be insolvent. By an order of the Court made on October 29th, 1923, both executors were given leave to assign the lands and premises in question to Florence Irwin in trust for the defendant, Florence Irwin undertaking to pay all arrears of rent and future gales of rent. On July 19th, 1922, the plaintiff obtained a judgment against the interest of the defendant in the lands, and duly registered it on August 3rd, 1922, as a judgment mortgage under sect. 6 of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29).

On April 28th, 1924, the plaintiff issued a summons to have it declared that the judgment mortgage created by the affidavit of ownership duly filed in the King's Bench Division of the High Court of Justice (Ireland) and registered in the Registry of Deeds on the 3rd of August, 1922, against the beneficial interest of the defendant as of that date in the said lands and premises therein mentioned was well charged in favour of the plaintiff, and that payment of the amount of the judgment be enforced by a sale of the said lands and premises.

C. S. Campbell, for the plaintiff:—

Defendant was both specific legatee of the chattel interest in the house and lands of Frascati and an executrix of the will of her husband. She assented to the bequest to herself, either actually or by implication, by reason of entering and taking the rents and profits to herself; the assent of one of two executors is sufficient, and once given, the chattel interest vested absolutely in her as legatee: Williams on Executors, 11th edition, p. 1106, *et seq.*; *Doe* v. *Sturges* (1). The creditors were not prejudiced because they could, if they wished, have followed the assets into her hands as legatee, or have proceeded against her as executrix for a *devastavit*: Williams on Executors, 11th edition, pp. 1612, 1613. The true nature of the estate which she took was, as described by Holmes L.J. in *Tevlin* v. *Gilsenan* (2): "subject to liability to the debts and expenses, an equitable estate therein which by the executor's assent is converted into a legal estate"; this is in accord with the decision of the entire Court in that case, the judgments in *Holland* v. *Chambers* (3), and in *Cooper* v. *Cooper* (4). Possession must be attributed to a lawful origin, and she could not be regarded as a trespasser, therefore

(1) 7 Taunt. 217, at p. 223.
(2) [1902] 1 I.R. 514, at p. 534.
(3) [1894] 2 I.R. 285.
(4) L. R. 7 H. L. 53.

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she was, at lowest, a tenant at will. When the judgment mortgage was registered in 1922, she had an interest either as legatee with or without assent, or as tenant at will, and the plaintiff captured that interest, however small it was: *Devlin* v. *Kelly*(1), and any enlargement of it by the deed of December, 1923, which was made in pursuance of the order of 29th October, 1923, must be regarded as an accretion which enures to the benefit of the plaintiff: Coote on Mortgages, 8th edition, p. 816. I also rely on *In re Scanlan's Estate* (2), and the grounds of the decision in *In re Rae's Estate* (3).

Denning K.C., for the defendant:—

There is no necessity to imply a tenancy at will. The new estate created in Miss Irwin was in no sense a graft, and there must be the relation of landlord and tenant in order to establish a tenancy at will. A specific legatee can convey his interest in the specific legacy subject to testator's debts. After the assignment to Miss Irwin nothing remained upon which the judgment mortgage could operate.

MURNAGHAN J.:—

The plaintiff in this summons obtained a judgment against the defendant, Mary Elizabeth Kennedy, on 19th July, 1922, and on 3rd August, 1922, proceeded to register the judgment in accordance with the sixth section of the statute 13 & 14 Vict. c. 29, against the interest of the defendant in the lands in question in this action, situate at Frascati, Blackrock, in the County of Dublin.

The interest which the defendant, Mrs. Kennedy, is alleged to have had in these lands arises under the will of her late husband, Frederick Kennedy, who died on 1st March, 1915. By this will, after appointing the defendant and George Hubert Kennedy as his executors, he bequeathed several legacies, and he also bequeathed to the defendant "the dwelling-house and premises wherein I at present dwell at Frascati, Blackrock, together with everything in the said house and premises." Both executors proved the will, and Mrs. Kennedy, who had been residing with her husband, continued to reside there, and to take the rents and profits for her own benefit. A number of the legacies bequeathed by the will were paid, some apparently in full, but on 26th June, 1916, an order for administration of the estate of Frederick Kennedy was made at the suit of a creditor. The order directed that the deceased's estate should be applied in due course of administration, and, as is usual in a creditor's suit, did not limit the inquiries to assets other than those specifically bequeathed, but directed a general inquiry as to the testator's estate and effects. In the course of the proceedings, the premises in question were found to be personal estate outstanding or undisposed of. The result of the inquiries was such

(1) 20 Ir. L. T. R. 76. (2) [1897] 1 I. R. 462. (3) 1 L. R. Ir. 174.

that the estate was found to have been insolvent, and it has been stated that the creditors would not receive more than four shillings in the pound.

On October 29th, 1923, by an order of the Court, both executors were given liberty to assign the premises in question to Miss Florence Irwin in trust for the defendant, and Miss Irwin undertook to pay all arrears of rent, and to guarantee payment of the future gales of rent. In my opinion, after this order and the assignment made in pursuance of it, the defendant had a beneficial interest in the premises, and if the registration of the judgment mortgage had taken place subsequently to the date of this order, it would have effected a beneficial interest of the defendant in the premises. Now, the plaintiff contends that he is entitled by reason of this judgment mortgage to have the interest of the defendant under the order of October 29th, 1923, and the assignment made under it, sold in order to realize the amount of his judgment.

Mr. Campbell has argued the case from several points of view, and contends that, on the evidence, Mrs. Kennedy, as one of the executors, must be taken to have assented to the specific bequest to herself. This conclusion has been disputed, but I am of opinion that as Mrs. Kennedy lived on the premises and enjoyed the profits for several years she must be taken as having assented to the bequest to herself, and that, in the interval between the death of her husband in March, 1915, and the order for administration in 1916, Mrs. Kennedy was in the position of a specific legatee who had obtained the assent of one of the executors to the bequest.

But I must then consider what results flow from this conclusion. The right of a creditor is a right to resort to any portion of the deceased's estate including specific bequests. See the case of *Davies* v. *Nicolson* (1), where it was held that even an assent by the executor to a specific bequest did not deprive a creditor of the deceased of his legal right to resort to the assets specifically bequeathed. In 1923 the administration of the estate in the present case had reached such a stage that it was apparent that it was insolvent, and the creditors were quite within their rights in having the premises in question sold. Instead of so doing, the creditors, by a gracious act, made a gift of these premises which they could have realized. I am of opinion that any interest which Mrs. Kennedy possibly might have, ceased at the date of the making of the order of October 29th, 1923, as the result was the same as if the creditors had realized the premises by sale, and disposed of the proceeds in any manner which they might choose, one mode of which might be that of handing over the proceeds to the defendant. It is also, to my mind, clear that the only interest which the defendant had in the premises was the contingency of the estate being sufficient to pay the debts of the deceased without resort

(1) 2 De G. & J. 693.

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to the specific bequest, or, if that were resorted to by the creditors, the right of recoupment against the estate not specifically bequeathed. I am, therefore, of opinion that the plaintiff's judgment mortgage does not affect any beneficial interest now vested in the defendant.

Mr. Campbell, on behalf of the plaintiff, contends that if Mrs. Kennedy had an interest, however slight it might be at the date of the registration of the judgment mortgage, the effect of the statute is to bind her present interest in the premises although subsequently acquired. In the actual state of events she had, in my opinion, no interest on which the statute could operate, but even if she had in law some interest at the date of registration it would not bind an interest subsequently acquired. In *In re Rae's Estate* (1), Ormsby J. pointed out that the provisions of the Judgment Mortgage Act (13 & 14 Vict. c. 29) are limited (by sect. 7) to "the estate and interest of which the debtor . . . . shall at the time of such registration be seized or possessed at law or in equity, or might at such time create by virtue of any disposing power which he might then, without the assent of any other person, exercise for his own benefit." At page 178 he says: "It was contended that the deed of the 22nd of May, 1875, should be construed as showing that the devisees, being then all *sui juris*, elected to take the land instead of having it converted into money. I do not think so. But, even if that were the true construction of the instrument, it could not, in my opinion, be held to have let in, or validated as charges on the lands, the judgments registered in the years 1872 and 1873."

Mr. Campbell founds an argument upon the latter portion of the section, and says that a mortgage by deed binds an interest subsequently acquired. The words of the section are "and such creditor . . . shall, in respect of such lands, tenements and hereditaments, or such estate or interest therein as aforesaid, have all such rights, powers, and remedies whatsoever as if an effectual conveyance, assignment, appointment, or other assurance to such creditor of all such estate or interest, but subject to redemption as aforesaid, had been made, executed, and registered at the time of registering such affidavit." In my opinion this section must be construed as limited to the estate or interest of the debtor at the date of registration of the judgment mortgage.

For these reasons the defendant had no interest upon which the plaintiff's judgment mortgage could operate on the 3rd August, 1922. The question submitted is whether under the circumstances the defendant had on August 3rd, 1922, any beneficial interest in the lands and premises, and the answer to that must be "No."

Solicitor for the plaintiff: *Wm. A. M'Cracken.*
Solicitor for the defendant: *Edwin M. Lloyd.*

R. R.

(1) 1 L. R. Ir. 174.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND IN THE MATTER OF GARRETT FITZGERALD AND JAMES J. FITZGERALD.

Wylie J. 1924. Dec. 16.

Supreme Court. 1925. Jan. 16. Feb. 16.

Practice—Inspection of public documents—Rights of the public—Common Law right to inspect—Limitations on the right—Register of Titles made under the Local Registration of Title (Ireland) Act, 1891—*Register a public register—Whether documents kept in office of registration can be inspected—Statute infringing upon the rules of Common Law—Principles of construction—Local Registration of Title (Ireland) Act,* 1891 (54 & 55 *Vict. c.* 66), *sect.* 56, *sect.* 94, *sub-sect.* 1 (*k*)—*Order III, Rule* 2, *of Orders and Rules made under the Local Registration of Title (Ireland) Act,* 1891, *dated September* 1*st,* 1910 — *Land Transfer Act,* 1875 (38 & 39 *Vict. c.* 87), *sect.* 104.

The register of titles to land directed to be kept by the Local Registration of Title (Ireland) Act, 1891, is a public register, and the documents which are kept in the office for the registration of titles are public documents in the fullest sense.

In the case of public documents there is a Common Law right of inspection, but that right must necessarily be exercised within certain limits. The limitation laid down by Denman C.J. in *R.* v. *Staffordshire JJ.*, 6 A. & E. 84, restricting the right to those persons who could prove themselves to be interested, is obviously a proper limitation. And there are documents which, for reasons of State, ought not to be disclosed.

There is nothing in the Local Registration of Title (Ireland) Act, 1891, or in the Rules made thereunder which is repugnant to the Common Law right of inspection of public documents. The obligation to keep books and indices for public inspection imposed by the Rules is in aid of the Common Law right, and does not infringe it.

Principles for the construction of statutes, which affect the rules of Common Law, considered.

The appellant had obtained judgment against T. F., and the judgment was not satisfied. T. F.'s father had been registered under the Local Registration of Title (Ireland) Act, 1891, as one of the owners of certain lands, and had died intestate in 1912. The name of T. F.'s father was kept on the register until October, 1924, a month or so after the issue of the writ in the action, when it was removed, and the name of T. F.'s brother was substituted. The appellant, having ascertained these facts from an inspection of a copy of the Folio at the central office of the Land Registry, and suspecting that the change in the name of the registered owners of the lands had been made with a view to evade execution against the estate of T. F. in the lands, applied for permission to inspect the application to discharge equities lodged with the Registrar and all other documents appertaining thereto. Permission was refused, and thereupon the appellant appealed to Wylie J.

Held by Wylie J., that the permission was rightly refused, as the application to discharge equities was practically an abstract of title, and the law regarded a person's title deeds as entitled to secrecy, and that, if the application were granted, no one's title would be safe from inspection.

Held by the Supreme Court (reversing Wylie J.), that the change in the register afforded good grounds for the suspicion that it was merely a device for saving the property of T. F. from some form of execution and that the transaction was fraudulent. And that this gave the appellant an interest in investigating the transaction, and such investigation could not be made without a full inspection of the register. Accordingly the appellant ought to be allowed the inspection which he required.

Wylie J.
1924.

In re FitzGerald.

Ex parte Application.

On 27th November, 1924, the Registrar of Titles under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), in the matter of the above-mentioned Act, and in the matter of Garrett FitzGerald and James J. FitzGerald, registered owners of land, Folio 8978, County of Kerry, refused the application of the appellant, John Foley, for a copy of the application to discharge equities filed by the said James J. FitzGerald, and also for copies of all documents filed in connection therewith.

From this ruling of the Registrar the appellant appealed to Wylie J. as Land Judge, being the Judge having jurisdiction in the matter under the said Act.

In his affidavit in support of his application, the appellant stated that on September 11th, 1924, he issued a writ against Timothy Thomas FitzGerald for the seduction of his daughter, Catherine Foley. The action was tried by a Judge and common jury on December 1st, 1924, and he (the appellant) recovered £350 damages against the defendant, who did not appear, and was not professionally represented at the trial.

That prior to October 16th, 1924, and subsequent to the issue of the writ, Thomas FitzGerald and James J. FitzGerald were named in the above-mentioned Folio as the registered owners of the lands of Gowlane, County Kerry. Thomas FitzGerald was the father of the said Timothy Thomas FitzGerald (the defendant in the action), but he died in 1912, intestate, having been predeceased by his wife, and leaving him surviving three children, namely, the said Timothy Thomas FitzGerald, Garrett FitzGerald, and Mary FitzGerald, who were, at the date of the application in this matter, in sole beneficial possession and occupation of the lands.

On October 16th, 1924, the said Garrett FitzGerald (the brother of Timothy Thomas FitzGerald) and James J. FitzGerald were, in pursuance of Application No. 369/6, entered on the said Folio as full owners (being tenants in common in equal shares) of the lands, subject as in the said Folio expressed.

The appellant also stated that he believed that the said Application No. 369/6 and the alteration of the Folio made thereon was effected with a view to preventing him from realizing his judgment against the lands, and that the transaction was a fraudulent one.

On the 27th November, 1924, the solicitor for the appellant applied to the Registrar for a copy of the said Application and all documents filed in connection therewith. The Registrar declined to accede to the request without the permission of the registered owners. The registered owners were, the appellant stated, hostile to him.

The appellant further stated that he was advised and believed that in order to realize his judgment against the lands and

against the said Timothy Thomas FitzGerald it would be necessary for him to bring further legal proceedings, and for this purpose it would be necessary for him to inspect the said documents to ascertain the nature of the transaction and the parties thereto. He therefore prayed the Court for an order granting him liberty to inspect and bespeak certified copies of the said Application No. 369/6 and all other filed documents appertaining thereto.

J. Reidy, for the appellant.

WYLIE J.:—

This application raises an important point of practice: Can anyone go to the Land Registry and inspect the documents there?

It is admitted that the Folio is open to inspection. But can a person, as in the present case, who wishes to take proceedings to set aside a transfer, inspect the Application to discharge equities—which practically amounts to an abstract of title? I think he cannot. It is argued that, if the transaction were registered in the Registry of Deeds, any person wishing to impugn it could inspect the memorial. But that is a wholly different matter. The memorial need only state the lands, the parties, the date, and the witnesses. The note on the Folio—which sets out a précis of the deed of transfer—is analogous to the memorial, and of course can be inspected. If I were to decide otherwise no one's title would be safe. The law regards title-deeds as sacred, entitled to as much secrecy as a man's bank account, and no stranger can scrutinize them for the purpose of looking for flaws.

The applicant here wants to find out whether a certain transfer was made for valuable consideration or not, with a view to taking proceedings to have the transaction set aside—in other words, this is a fishing inquiry, seeking for information which tends only to expose the weakness of the adversary's case, and not to establish the strength of the applicant's own case—the very kind of inquiry which the Courts have always set their faces against.

I am fortified in my view by the English practice, which, indeed, even goes further, for in England the Folio itself is not open to inspection. But in this country the subject is provided for by Order III of the Land Registry Rules of 1st September, 1910.

If the applicant takes proceedings to have the sale set aside, he can, if necessary, and if he makes a sufficiently strong case, obtain an order of the Court compelling the officials to produce the necessary documents for inspection. He has also many other remedies: in Bankruptcy and by examination as to means.

I refuse the present application.

T. C. T.

Supreme Court. 1925.

In re FITZGERALD.

The applicant appealed to the Supreme Court (1), Wylie J. having granted leave to appeal.

In his notice of appeal the appellant asked for an order that the order of Mr. Justice Wylie refusing the application of the appellant "for permission to inspect Application No. 369/6 on Folio No. 8978, Register, County of Kerry, and all other documents appertaining thereto and to be at liberty to bespeak certified copies of same," be discharged, "and in lieu thereof that it may be ordered that the said application of the appellant be granted on such terms and conditions as to the Court shall seem just."

Binchy, for the appellant:—

The Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), sect. 9, sub-sect. 2, provides that judicial notice shall be taken by all Courts of law of the official seals of the central registering authority and of each local registering authority, that any instrument purporting to be sealed with any such seal shall be admissible in evidence, "and, if a copy, shall be admissible in like manner as the original." In a note to this section in "Registration of Title in Ireland" by Browning and Glover, 2nd edition, page 111, it is stated that "copies of any documents retained in the central or a local office can be obtained by any person applying therefor on payment of the office fees." By sect. 94, sub-sect. 1 (*k*), Rules may be made in respect of "the inspection of and making copies of or extracts from any register or document in the custody of the central or any local office"; and Order III, Rule 2, provides that the registers and indices (which have to be kept in the central and local offices) "shall be open to public inspection during office hours on payment of the proper fees." I submit that, under these provisions, any member of the public can obtain a copy of any document retained by the registering authority upon payment of the appropriate fee. As a member of the public, the appellant is entitled to inspection of the documents relating to the transfer of ownership in this case. The object of this application is to ascertain, by an investigation of the documents, whether the individual against whom judgment was obtained has, as one of the next-of-kin, an interest in the lands. A judgment can be enforced against the distributive share of a next-of-kin in chattels real: *Tevlin* v. *Gilsenan* (2).

The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), and the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), which resemble the Local Registration of Title (Ireland) Act, 1891, in many ways, are much more restricted in the provisions

(1) Before KENNEDY C.J., O'CONNOR and FITZGIBBON JJ.

(2) [1902] 1 I. R. 514.

relating to inspection of documents. Section 104 of the Land Transfer Act, 1875, lays down that any person registered as proprietor of any land or charge, "and any person authorised by any such proprietor, or by an order of the Court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge." Sect. 22, sub-sect. 7, of the Land Transfer Act, 1897, provides that nothing in the rules made under sect. 111 of the Land Transfer Act of 1875 as amended by the Act of 1897, shall extend to allow the inspection of any entry in the register, "except by or under the authority of some person interested in the land or charge to which the entry refers." The absence of any such provision in the analogous Irish statute shows that documents in the Irish Registry of Titles offices were regarded by the framers of the Act as being in the same position as Court records which may be inspected by any person on payment of the prescribed fee.

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KENNEDY C.J.: I have had the advantage of reading the judgment about to be delivered by Mr. Justice O'Connor, and I concur in it.

O'CONNOR J.:—

In this case an application was made by John Foley to the Registrar of Titles under the Local Registration of Title Act for a copy of an Application No. 369/6, mentioned in the Folio of registered lands, in pursuance of which the name of Thomas Fitzgerald, who had been previously registered as the owner of an estate in the lands, had been struck out, and the lands registered in the name of Garrett Fitzgerald and James J. Fitzgerald.

The application to the Registrar was made under these circumstances:—John Foley, on the 11th September, 1924, had commenced an action against Timothy Thomas Fitzgerald, the son of Thomas Fitzgerald, for damages for the seduction of his (the plaintiff's) daughter, and on the 1st December, 1924, recovered judgment against the defendant for £350. The judgment was not satisfied, and when the plaintiff, John Foley, proceeded to investigate what property the defendant had, so that it might be made available, he ascertained that Thomas Fitzgerald (the father of Timothy Thomas) and James J. Fitzgerald had been the registered owners of the land; that Thomas Fitzgerald had died intestate in 1912, leaving his children, Timothy Thomas Fitzgerald, Garrett Fitzgerald, and Mary Fitzgerald, his sole next-of-kin, and that they, since their

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father's death, were, and continued to be, in the possession and enjoyment of the lands. Presumably, then, each of them became entitled to one undivided third share of the estate of Thomas Fitzgerald, deceased. No change had been made in the register on the death of Thomas Fitzgerald, but on the 16th October, 1924—little over a month after the issue of the writ—the register was altered by striking out the name of Thomas Fitzgerald and registering Garrett Fitzgerald and James J. Fitzgerald as full owners, as tenants in common, in equal shares, thus ignoring the right of Timothy Thomas to one-third share of the estate of his father, Thomas Fitzgerald.

This circumstance certainly gave reasonable grounds for suspicion that the transaction on the register was a device to escape execution against the estate of Timothy Thomas—whatever it was—in the lands in case judgment should be entered against him, as it subsequently was, and the plaintiff proceeded to investigate the matter. He procured a copy of the Folio of the lands, which revealed the fact of the suspicious transaction, and he applied to the Registrar for an inspection, or copies of the documents on which the Folio was constructed. The Registrar refused the application on the ground that the applicant was a stranger to the lands. From this refusal he appealed to Mr. Justice Wylie, as the Judge having jurisdiction under the Local Registration of Title Act, and the appeal was dismissed. It is from this dismissal that the present appeal has been brought.

The case is of some importance, because it raises the question whether the register of lands is a public document open to the inspection of any member of the public, or only to those who appear from the register to have some estate or interest in the registered lands, or those who can show that the estate has devolved upon them in some way.

The applicant claims the right of inspection, first, as a member of the public, and, secondly, as a member of the public who, although having no estate in the lands, has a good reason for investigating the title.

Let us see, then, what are the rights of the public over the register directed to be kept by the Local Registration of Title Act. I do not think that it can be open to dispute that the register is a public register. The office was created for the benefit of the public at large, not for the benefit of any section of the public, or for any particular locality. It differs in this respect from such offices as have been created for purely parochial or local purposes, in which ratepayers of a parish, or the inhabitants of a particular locality, are the only persons who can have an interest. Such persons are the only persons who have an interest in, or are concerned with, the matters dealt with in the offices of their particular localities. But in the register of titles to land every subject of the State may have an interest irrespective of locality. The office for the registration of titles, moreover, is maintained out of public funds, to which every member of the

State contributes, and I cannot conceive any more certain indication of the public character of an office than that it is maintained by the State and for the State. It follows that the documents kept in such an office are public documents in the fullest sense.

What, then, are the rights of the public over them? We are not left without authority on the subject. In *Herbert* v. *Ashburner* (1) an order was made giving the defendant liberty to inspect the books of the sessions of the Corporation of Kendale. Now the documents in that case may not have been public documents in the full sense. That is, they may not have been documents in which every subject of the King had an interest, but only those who were subject to the jurisdiction of the Corporation. As to that limited class, they were public. Cause was shown against the order, but it was disallowed, the Court pronouncing that the books were public books which everybody had a right to see. Again, in *R.* v. *Justices of Staffordshire* (2), a mandamus was issued calling upon the Justices to allow certain ratepayers to inspect orders of sessions and certain accounts. Here, also, the documents were not, in the full sense I have mentioned, public documents, but, *qua* the ratepayers, they may have been. On the return to the writ of mandamus it was argued that the Common Law right of the ratepayers was taken away by the statutes under which the orders of sessions and the accounts were directed to be made and kept. The return was held to be good on the ground that the statutes negatived the Common Law right, which they clearly did, but the Court was careful to assert the general Common Law right. Denman C.J., in giving judgment, said (3): "We are by no means disposed to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which any one of the King's subjects can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee."

In the case, therefore, of public documents, there is a Common Law right of inspection, but that right must necessarily be exercised within certain limits. Denman C.J. limited the right to such persons who can prove themselves to have an interest. Obviously, this is a proper limitation, because the uncontrolled inspection of public documents might result in a public nuisance. It might lead to disturbance of office business, waste of the valuable time of public officials, disarrangement of records and general annoyance. Further, there are certain documents which, for State reasons, ought not to be disclosed, and the general right of the public must, for that reason, be curtailed. But, in the absence of any such reasons as I have mentioned, the general Common Law right is maintained in favour of any person who can show that he has an interest.

This brings us to the question whether the applicant in

(1) 1 Wils. 297. (2) 6 A. & E. 84. (3) 6 A. & E., at p. 99.

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the present case has such an interest as makes it reasonable for him to demand inspection. The facts are as I have already stated, and it does not require very much astuteness to form a good guess as to the reasons for the change in the register. There are good grounds for the suspicion that it was merely a device for saving the defendant's property from some form of execution, and that the transaction was fraudulent. This, in my opinion, gave the plaintiff an interest in investigating the transaction, which could not be done without a full inspection of the register. It cannot be said that his motive is idle curiosity, or, indeed, in any respect unreasonable. It seems to me that he was actuated by a legitimate desire to expose a transaction which any reasonable judgment creditor would be justified in treating as *primâ facie* fraudulent. In my opinion, such a person is deserving of assistance from this Court.

As I understand, the reasons for the refusal of the Registrar to give inspection are, first, that the applicant has no interest in the lands, as appears from the Folio which records the present state of the title—that is, no specific interest in the shape of an estate in the lands. Let us see what that leads to. If the defendant were made a bankrupt, his Assignees in Bankruptcy would for the same reason be shut out from investigation. They, too, would be precluded from going behind the Folio, and would have no means of investigating the transactions which led up to the existing condition of the Folio. Is the Folio to be a cloak for fraudulent transactions?

Another reason has been alleged. It is said that the matter is regulated by the Act of Parliament and the Rules made under its authority, and that by sect. 56 there is given a right to the public to inspect maps which are to be kept in the office, and that by Order III, rule 2, it is provided that books and indices shall be open to public inspection—these to contain registers of owners and persons having rights against the lands. From this, as I understand, it is inferred that there is no further right of inspection—that the public are only entitled to see who are the registered owners, and have no right to inspect the documents on which the registers are made up. In other words, the Common Law right to full inspection is negatived by the special provisions. In my opinion, this argument cannot prevail unless it is shown that the statutory enactment is inconsistent with the Common Law rights.

The law on this subject is satisfactorily stated in Craies' "Treatise on Statute Law," 3rd edit., p. 282. It is there stated:—"Coke says (2 Inst. 200), that 'it is a maxim in the Common Law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the Common Law.' But it is doubtful whether this statement can be described as a maxim or considered as more than a very feeble presumption. In *Mayor of London* v. *Reg.* (1) Alderson B.

(1) 13 Q. B., at p. 33, note (*d*).

said in the course of the argument: 'The words "negative" and "affirmative" statutes mean nothing. The question is whether they are repugnant or not to that [Common Law] which before existed. That may be more easily shown when the statute is negative that when it is affirmative: but the question is the same.' And the true rule for interpreting statutes which may affect the rules of Common Law and equity and legal and equitable remedies (whatever be the form of the statute), is to consider whether the statutory provision is repugnant to the former substantive or adjective law, or whether it merely operates to strengthen the former law by giving more effectual remedies, whether exclusive or alternative." Now, I can find nothing in the Local Registration of Title Act or in the Rules which is repugnant to the Common Law right of inspection. The obligation to keep books and indices for public inspection seems to be in aid of the Common Law right of inspection. I see nothing in such obligation to infringe it.

Indeed, it seems to me that the Local Registration of Title Act contains a recognition of the public right of inspection. The power to make rules regulating inspection involves the right of inspection, and it is remarkable that the Rules were to regulate not merely the inspection of registers, but *any document* in the custody of the central or any local office—a recognition of the right to general inspection.

In my opinion, it would be to the public detriment that the mere register, which only records the present title, as exhibited, should be held to be a block in the way of any person who desired, however legitimately, to get behind it for the purpose of seeing that the title was duly registered. It would operate as a screen for irregularities or mistakes, and, without imputing anything blameworthy, I may say that it has been found necessary sometimes to rectify the register. It is good for the public interest that it should be known that, if there has been any mis-carriage, the result of mistake, either by an applicant or by any officer in the office, or possibly the fraud of an applicant for registration, the full light of day may be thrown on it, and that which was done wrongly may be made right. If it were to remain for ever in darkness over-shadowed by a Folio, there would be immunity for fraud and the absence of a wholesome check upon officers, no matter how efficient and zealous in the discharge of their duties.

Our attention was called to the 104th section of the Land Transfer Act, 1875, which provides that, subject to regulations and payments to be fixed by general rules, any person registered as proprietor of any land or charge, and any person authorized by such proprietor, or by an order of the Court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge. We were told that the mind of the Judge, who made the order appealed

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from, was influenced by this section, and that it led him to the conclusion that registers of title are not such public documents as the public are entitled to inspect. In my judgment, it is, on the contrary, a very strong confirmation of the general right, because it was found necessary by express negative enactment to infringe it. The negative is contained in the words: "no other person may inspect." Here we have an example of that repugnancy to the Common Law which is mentioned by Alderson B. in the *Mayor of London* v. *Reg.* (1) (already referred to), and which, he said, may be more easily shown when the statute is negative than when it is affirmative.

The similarity of the language of sect. 104 of the Land Transfer Act, 1875 (38 & 39 Viet. c. 87), and sect. 94, subsect. 1 (*k*), of the Local Registration of Title (Ireland) Act, 1891, is very remarkable. In the former we have the words: "may inspect and make copies of and extracts from any register or document in the custody of . . ." In the latter we have: "The inspection of and making copies of or extracts from any register or document in the custody of . . ." This makes it clear that the learned draughtsman of the later Act worked upon the former to some extent as a precedent, and it is very remarkable that the negative words expressly infringing on the public right, and which were before his eyes, were omitted by him—and, no doubt, deliberately and for good reason.

It is also to be observed that although the general public right is taken away it is provided by the section in the English Act, that the opportunity for inspection may be given by an order of the Court to any person, and I feel sure that, in circumstances which would give fair grounds for suspicion that the register was the result of a fraudulent contrivance for the purpose of defeating a creditor, indulgence would be extended to him.

No doubt an unlimited right of inspection may be abused. It makes it possible for ill-conditioned or eccentric people to demand inspection without any good reason. But rights are given for use, and not abuse, and in any case in which the right is abused it is open to the Registrar to refuse inspection, and in such case he would be supported by the Judge having authority in the matter.

In the course of the argument my brother FitzGibbon referred to the position of the Land Judge to whom jurisdiction over the registration of titles was committed by the Local Registration of Title Act. He was also made the Rule-making authority. The Registration Office was, in effect, made a department of the High Court, and one would infer that all documents in the Registration Office would be open to public inspection as are documents filed in the High Court. Under General Orders made in pursuance of the Chancery (Ireland) Act, 1867,

(1) 13 Q. B. at p. 33, note (*d*).

dated 31st October, 1867, No. 272, all documents filed at the office of the Clerk of Records and Writs were made accessible to the public. I can see no reason for denying to the public inspection of documents in the Registration of Titles Office which would not apply to documents filed in the Records and Writs Office. Any member of the public may, on the payment of the prescribed fees, obtain a copy of the record of any action.

For these reasons, I am of opinion that the applicant ought to be allowed the inspection which he requires.

FITZGIBBON J: I agree.

Solicitor for the appellant: *Maurice M'Cartie.*

C. L.

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Wylie J.
1924.
Nov. 25.
Supreme Court.
1925.
Jan. 30.

IN THE MATTER OF THE ESTATE OF WILLIAM DARCY.

Landlord and tenant—Land purchase—Sub-tenants—Holdings situate in a village and without land—Holdings not agricultural or pastoral—Sub-tenants' right to reduction of rent—Jurisdiction of Judicial Commissioner—Land Act, 1923 (No. 42 of 1923), sects. 19, 23, and 26.

A tenant of a large holding, which included a village, had upon it sub-tenants, whose residential holdings in the village consisted only of houses, with small plots of land attached. These sub-tenants were, with one exception, substantially dependent for their living on occupations unconnected with the land. The tenant refused to allow the sub-tenants a reduction of 25 per cent. under sect. 23 of the Land Act, 1923, and he applied to the Judicial Commissioner for a declaration that the holdings of the sub-tenants be exempted from the operation of the Act. Wylie J. held that the Act did not apply to the sub-tenants' holdings, and that the sub-tenants were not entitled to get the reduction of 25 per cent. provided by sect. 23 of the Act.

Held by the Supreme Court, that Wylie J. had no jurisdiction to entertain the application, and that accordingly his order must be discharged.

MOTION on behalf of William Darcy, a tenant on the estate of Colonel Henry J. Roche, County Limerick, for an order that his holding of part of the lands of Ballyagran, containing 231 A. 0 R. and 14 P., and comprising (*inter alia*) the village of Ballyagran, and held by him at the judicial rent of £160 10s. 10d., is a holding within the provisions of the Land Act, 1923; and a further motion by the said William Darcy for an order that the holdings of his sub-tenants in the village of Ballyagran were to be declared exempted from the operation of the Land Act, 1923.

William Darcy was, up to the passing of the Land Act, 1923, tenant to Colonel Henry J. Roche of part of the lands of Ballyagran containing 231 A. 0 R. and 14 P., Statute measure, in the County of Limerick, subject to a judicial rent of £160 10s. 10d. The said holding included the village of Ballyagran which consisted of ten houses, the tenants of which were sub-tenants to the said William Darcy, all of whose holdings were small. A supplemental affidavit read in the Supreme Court showed that one of the sub-tenants held his holding under a judicial tenancy. All the sub-tenants had occupations such as road steward, postman, shopkeeper, school teacher, tailor, labourer, publican, blacksmith, and carpenter, upon which occupations they largely depended for their living apart from any profits derived by them from their plots of land. William Darcy sued two of the sub-tenants in the County Court for rent, and County Court Judge Pigott gave decrees for the rent reduced by 25 per cent. Appeals against these orders were lodged by William Darcy, but, pending the hearing of the appeals, he made the present application to the Judicial Commissioner.

Hewitt Poole, for William Darcy:—

Darcy's holding is clearly within the provisions of the Land Act, 1923. His sub-tenant holdings, however, are outside the Act, because they are not mainly agricultural or pastoral, but are entirely residential plots, and they also have a potential value for building purposes. The word "sub-tenants" in this Act must be read with the earlier Acts. They all constitute one code, and must be construed together. None of the earlier Acts applied to a house let without land, or with a garden attached, as here.

M. Binchy, for the sub-tenants:—

The sub-tenants' holdings form portions of a holding to which the Act applies. They are, therefore, within sect. 23, sub-s. 1, which gives them the 25 per cent. reduction in rent, irrespective of the nature of their holdings. This section is not qualified by any of the exceptions contained in sect. 24, which are expressly limited to sect. 24 itself. Even if the holdings of sub-tenants are of such a nature as to prevent them from vesting in the Land Commission as "tenanted land," yet the sub-tenants are entitled to the reduction of rent expressly given by sect. 23. In the case of such sub-tenancies the rent is not payable to the Land Commission, and in this respect the provisions of sect. 23 differ from those of sect. 19. The rent payable under sect. 23 is a matter which concerns only sub-tenant and tenant, and does not concern the Land Commission at all. If the proper amount is not paid, the tenant can sue the sub-tenant at law. That is the appropriate remedy, and the tenants' appeal to the jurisdiction of the Judicial Commissioner is misconceived. The Court ought to make no rule on this motion.

WYLIE J.:—

First let me say I am not at all influenced by the fact that, in proceedings brought by the tenant against his sub-tenants for rents due by them before the County Court Judge, it was held that Darcy was entitled to recover from them only the rents due by them less 25 per cent.

The real question I have to decide in this case is this:—Is the holding one to which the Land Act of 1923 applies? Two matters have to be considered in this connexion. First of all, we must consider the scope and object of the Act. It is one passed for the purpose of completing Land Purchase, and I am asked to decide (*a*) whether the large holding which includes a village of ten houses, none of which have any land attached, is within that Act; and (*b*) whether the sub-tenants of the village holdings are within the Act. There is no contest as to the first question, and I declare the large holding is within the Act. The only difficulty is as to the village holdings. They are all occupied by persons who derive their means of livelihood

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from occupations unconnected with the land. Amongst these there is a blacksmith, a postman, a school teacher, and various shopkeepers, all in the village, and I am certainly not going to decide that the small holdings upon which they live in the village are holdings of the class to which the Act is intended to apply.

Then there is the point put to me by Mr. Binchy that these village holdings are within the Act for the purpose of enabling the tenants to get the 25 per cent. reduction of rent. He bases his argument upon the early sub-sections of sect. 23. This involves my deciding whether the holdings can ever be vested in them under the Act or not, because I am clearly of opinion that if the holdings cannot be vested in them under the Act they are not entitled to be brought under the Act for the purpose of rent reduction. There are two reductions of rent provided for in the Act. There is first a reduction of 25 per cent., and there is, secondly, a further reduction which the tenant will get on vesting. If Darcy is not entitled to get his holding ultimately vested in him he is not entitled to get either the first or second reduction. In the same way I think that if the sub-tenants are not entitled to get their holdings vested in them under the Act they are not entitled to get either the first or second reduction. It is true that the drafting of sect. 23 is not artistic, and might have been clearer. Sect. 23, sub-s. 1, says: "Where a holding to which this Act applies is sub-let in whole or in part the rent payable by any sub-tenant to the tenant thereof shall, as from the gale day next preceding the date of the passing of this Act, be reduced by 25 per cent."

I agree that there is not one word about lands in that sub-section, and, taken by itself, it might apply to the tenant of a house as well as to the tenant of a farm, but the section must be taken with the Act as a whole. Look at sub-s. 3 which says: "This section shall not apply to any sub-letting made for the purpose of temporary depasturage, agistment, or conacre, or for temporary convenience, or to meet a temporary necessity." Did anyone ever hear of a house being let for temporary depasturage, agistment, or conacre? This clearly shows that the section does not apply to houses let without land, and the section must be read with the rest of the Act, the intention of which is not to provide State moneys for the purchase of houses and the vesting of them in the tenants.

There is another matter to be considered. This Act is part of a Code, and must be read in conjunction with the earlier Land Acts, and no previous Act applied to houses let without land. I am satisfied that the provision of sect. 23, sub-s. 1, cannot be divorced from the rest of the Act, and, accordingly, I decide that these holdings are outside the Act, that is to say, Darcy's holding is within the Act, but the sub-tenants holdings are outside the Act.

H. H.

The sub-tenants appealed to the Supreme Court (1).

J. M. Fitzgerald K.C. (with him *M. Binchy*), for the appellants:—

All sub-tenants, with the exception of those excluded by sub-s. 3 of sect. 23 of the Land Act, 1923, are entitled under that section to a reduction of 25 per cent. in their rents; and so long as the middleman continues liable for payment of the purchase annuity in respect of the holding he cannot obtain more than 75 per cent. of the former rent from such sub-tenants as do not come within sect. 26 for the purpose of purchase. Sub-tenants pay their rents directly to their immediate landlord, and not to the Land Commission. So far as the operation of sect. 23 is concerned, the Land Commission has no right to intervene.

Sect. 26 of the Act enables sub-tenants to become purchasers of their holdings, and sub-s. 1 (*d*) of that section is the only provision in the statute which gives the Land Commission power to exclude sub-tenants from the benefit of the Act; but that exclusion is strictly limited to the purposes of re-sale and purchase. Wylie J. has erroneously read sect. 26 into sect. 23. He had, we submit, no jurisdiction whatever to exclude the sub-tenants from the benefit conferred upon them by sect. 23. The Act does not provide any machinery enabling a middleman to come to the Court for a declaration against his sub-tenants.

Hewitt Poole, for the respondent:—

Under Order 7, rule 3, of the Land Commission Rules of February 5th, 1924, Wylie J. had jurisdiction to deal with the application made by the middleman in this case. I admit that sect. 23 deals with rent and arrears of rent in the case of sub-tenancies, and does not directly refer to land purchase, but the section must be read with the Act as a whole. Sect. 26, sub-s. 1 (*d*), enables the Land Commission to exclude sub-tenancies.

KENNEDY C.J.:—

We are unanimously of opinion that Wylie J. had no jurisdiction to make the declaration appealed from, or to entertain the question submitted to him. The only section which we have been referred to as giving such jurisdiction does not deal with the rights of sub-tenants under sect. 23. It deals with standard price and re-sales by the Land Commission. We therefore discharge the order on the ground that it was made without jurisdiction, and we award the appellants their costs in the Court below and in this Court.

Solicitors for the appellants: *James Binchy & Son.*
Solicitor for the respondent: *James T. Liston.*

C. L.

(1) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Meredith J.
1925.
Feb. 17, 26.

JOHN MOORE, PLAINTIFF, *v.* BERNARD O'REILLY, DEFENDANT.

Practice — Transfer of action — Action commenced in the High Court — Transfer to Circuit Court—Writ issued before the establishment of Circuit Court—Action for specific performance—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *sect.* 36—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 17, 22, 24, 25, 36, 51—*Adaptation of Enactments Act,* 1922 (*No.* 2 *of* 1922), *sect.* 12.

The Courts of Justice Act, 1925, sect. 25, provides:—"When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may . . . apply to the High Court that the action be remitted or transferred to the Circuit Court . . ."

The defendant in an action for specific performance applied to have the action transferred to the Circuit Court. At the time when the writ was issued the Circuit Court had not been established in that part of the Irish Free State to which it was sought to have the action transferred.

Held, that the action could not be transferred under sect. 25 of the Courts of Justice Act, 1924, because the action could not have been commenced in the Circuit Court at the time when it was commenced, since the Circuit Court was not then established, nor could it be transferred under sect. 36 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), which formerly regulated the transferring of actions from the Chancery Division of the High Court to the County Court.

M'Collum v. *Tease,* [1925] 2 I.R. 33, applied.

MOTION TO TRANSFER.

Motion by the defendant to transfer to the Circuit Court at Cavan, an action begun in the High Court, for the specific performance of an agreement for the sale of land. The writ was issued on the 28th June, 1924. The Circuit Court was not established in the Northern Circuit (which includes Cavan) until August 6th, 1924 (1).

Geoghegan, for the defendant, in support of the motion:—

This application is distinguishable from *M'Collum* v. *Tease* (2), which was a motion to remit, under sect. 25 of the Courts of Justice Act, 1924 (No. 10 of 1924), a common law action for damages for assault. In that case the writ in the action was issued before the establishment of the Circuit Court, as here, and the Supreme Court held that, as the action could not have been commenced in the Circuit Court at the time it was commenced, there was no jurisdiction to transfer the action for trial to the Circuit Court under sect. 25 of the Courts of Justice Act, 1924. The present action is for specific performance, and

(1) [As to the dates of the establishment of the Circuit Court in different parts of the Irish Free State, see [1925] 2 I.R. 61, note (2).—ED.]

(2) [1925] 2 I. R. 33.

can be remitted under sect. 36 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). *M'Collum* v. *Tease* (1), could have been remitted under sect. 6 of the Common Law Procedure Amendment Act (Ireland), 1870 (33 & 34 Vict. c. 109), had the application been made within the time allowed by that Act. Under the Act of 1877, the application may be made at any time, and under sects. 17 and 21 of the Courts of Justice Act, 1924, the jurisdiction of the former High Court is transferred to the existing High Court, and under sect. 51 the jurisdiction of the County Court is now vested in the Circuit Court. The right to remit or transfer given by sect. 25 of the Courts of Justice Act, 1924, is in addition to, and not in substitution for, the right given by sect. 36 of the Act of 1877.

T. J. Smyth, for the plaintiff:—

The motion is unsustainable by reason of the decision in *M'Collum* v. *Tease* (1). But I admit that the case would be a proper one to transfer, were there jurisdiction to do so.

Cur. adv. vult.

Feb. 26.

MEREDITH J.:—

This was an application to remit to the Circuit Court an action for specific performance of an agreement for the sale of a farm in Drumavannagh, County Cavan. The writ was issued on the 28th June, 1924, and, as the Circuit Court was not established on that date, the action could not, on that date, have been commenced in the Circuit Court. Now, in *M'Collum* v. *Tease* (1), the Supreme Court held that sect. 25 of the Courts of Justice Act, 1924, does not apply to actions which had been instituted before the Circuit Courts were established. That being so, and the case not being within sect. 25, Mr. Geoghegan argued that the jurisdiction under sect. 36 of the County Officers and Courts (Ireland) Act, 1877, remains, and is unaffected by sect. 25 of the Courts of Justice Act. Sect. 25 seems to imply the establishment of the Circuit Court at the material point of time, and the contention is, that it leaves the old, but transferred, jurisdiction to cover the transitional cases arising pending the establishment of the Circuit Courts.

Now, even if I thought that this contention might be sustainable, yet, as a similar point might have been made in *M'Collum* v. *Tease* (1), I should have felt bound, having regard to the decision in that case, to have refused the application, and to have left it to the Supreme Court to decide whether or not Mr. Geoghegan's out-flanking argument should be allowed to prevail. But I think it is clear that this attempt to get round *M'Collum* v. *Tease* (1) must fail.

(1) [1925] 2 I. R. 33.

Meredith J. 1925.

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Mr. Geoghegan's argument as to the transfer of jurisdiction is sound, and his argument may also be supported by Article 73 of the Constitution. But sect. 36 of the Act of 1877 only applies to suits or proceedings pending in the High Court of Chancery, and the transfer is to the Civil Bill Court. Consequently, the section is of no help unless its provisions have been adapted. For this purpose Mr. Geoghegan relied on sect. 36, paragraph (ix), and on sect. 22 of the Courts of Justice Act. But these provisions only apply to procedure in exercising a jurisdiction, and not to the adaptation of statutory provisions investing the Courts with any particular jurisdiction. Accordingly, I looked at the Adaptation of Enactments Act, 1922 (No. 2 of 1922). But there is no section in that Act that helps the applicant, unless the Executive Council has made the requisite adaptation under sect. 12. As far as I know, the Executive Council has made no adaptation that would help the applicant, and I have not been referred to any. Accordingly, the application must be refused, with costs.

Solicitor for applicant: *George V. Moloney.*
Solicitors for respondent: *W. J. Feegan & Co.*

G. G. D.

JOHN GUERIN, PLAINTIFF; WILLIAM HEFFERNAN, DEFENDANT (1).

(1923. No. 452.)

Supreme Court 1924.

Nov. 10, 11, 12. Dec. 12.

Vendor and purchaser — Specific performance — Delay — Representation by vendor as to giving peaceable possession—Default of vendor—Repudiation of contract— Acquiescence.

On March 18th, 1922, the defendant agreed in writing to purchase certain lands from the plaintiff, subject to Conditions of Sale which fixed April 8th, 1922, as the date for the completion of the contract. The defendant was given a verbal assurance by the plaintiff that he would be allowed to enter peaceably upon the lands, without claims, molestation, or threats by members of the plaintiff's family or other persons.

On March 22nd the defendant wrote to the plaintiff's solicitor, stating that he had "withdrawn from the purchase," as he "did not wish to be interfering in family affairs," and that he had been threatened by members of the plaintiff's family. Negotiations, however, were continued; but on April 19th, 1922, the defendant, through his solicitor, definitely renounced, stating that owing to a threatening notice (in addition to several verbal threats) he could not complete. Thereupon the plaintiff gave the defendant notice that he would take proceedings. Subsequent to the date fixed for the completion of the contract by the defendant, the plaintiff advertised for sale meadows on the land, and the defendant, who was the owner of other farms, released the purchaser of one of these, which he had agreed to sell in consequence of his proposed purchase from the plaintiff.

On June 13th, 1923, the plaintiff issued a writ, claiming specific performance of the contract, or, alternatively, damages for non-completion. Defendant pleaded misrepresentation by the plaintiff as to giving peaceable possession.

Held by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), affirming Pim J., that on the ground of delay, accompanied by acts which were only consistent with the plaintiff's acquiescence in the repudiation of the contract and his election to treat it as at an end, the plaintiff was not entitled to equitable relief.

Held by Kennedy C.J., that the defence of representations inducing the defendant to enter into the contract was a real defence, as the defendant made it clear that he must get the goodwill of the plaintiff's family, and the plaintiff was never in a position to give the defendant the lands with such goodwill. In the sale of what may be called a "family holding" in this country this "goodwill" cannot be ignored as a factor in the transaction.

APPEAL by the plaintiff from an order of Pim J., dated July 15th, 1924, dismissing an action brought by the plaintiff against the defendant for specific performance of an agreement, dated March 18th, 1922, for the purchase by the defendant from the plaintiff of freehold registered lands at Clashdrumsmith, County Tipperary, containing 39 acres 1 rood 6 perches.

On March 18th, 1922, the lands were put up for sale at a public auction by Messrs. Nicholas Maher & Sons, Auctioneers. The Conditions of Sale provided that the purchaser should,

(1) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

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immediately after the sale, pay one-fourth of the purchase-money and complete the sale on or before April 8th, 1922; that the vendor should, within four days from the date of sale, deliver to the purchaser, or his solicitor, an abstract of title consisting of a copy of a deed of family settlement of July 4th, 1904, and a copy of the land certificate. By the deed of family settlement (to which the plaintiff and his sisters, Lizzie Guerin, Kate Guerin, and Ellen Guerin, were parties) the lands in question were assigned to the plaintiff by the said Lizzie Guerin, subject to a charge of £300 in favour of the said Kate Guerin, and an annuity of £6 in favour of the said Ellen Guerin The said Lizzie Guerin retained other lands adjoining those assigned to the plaintiff.

Prior to the sale (on March 14th, 1922), an agreement was entered into between the plaintiff and his said sisters, whereby these sisters consented to the sale of the lands, freed from all charges, upon the payment of £300 to Kate Guerin; £90 with interest to Lizzie Guerin; and £300 in full for all arrears of annuity due, or to accrue due, to Ellen Guerin. It was further agreed that, on the sale, a right-of-way should be reserved over the holding to the lands of Lizzie Guerin. The sisters agreed and undertook "to sign any document or do any act or thing necessary for the completion of the purchased title to the premises, free from incumbrances, as soon as the conditions hereinbefore appearing in their favour (as set out above) have been fulfilled."

The Conditions of Sale contained a condition dealing with the reservation of a right-of-way over the holding to the lands of Lizzie Guerin, which is set out in full in the judgment of the Chief Justice.

At the auction, on March 18th, 1922, the reserve price was not reached. On the same day, shortly after the auction, the defendant signed the memorandum at the foot of the said Conditions of Sale, agreeing to buy the lands at the sum of £3,350. He made a deposit on foot of the contract amounting to the sum of £837 10s., which comprised two promissory notes, one for £800 and the other for £27 10s., and a cash payment of £10. The auctioneer also signed the contract, confirming the sale on behalf of the vendor. According to the Conditions of Sale the purchaser was to leave a draft of the assurance of the property to him at the office of Mr. Nicholas E. Maher, the vendor's solicitor, for approval, not less than six days before April 8th, 1922, the day appointed for the closing of the sale.

On March 22nd, 1922, the defendant wrote to the plaintiff's solicitor saying: "In regard to John Guerin's farm, I have withdrawn from the purchase of it. I do not wish to be interfering in family affairs. His sisters threatened me several times since, and they wish that anybody would have it besides me, so I am not going to have hand, act, or part in it."

On April 19th Mr. John Dwyer, the solicitor then acting for the defendant, wrote to the plaintiff's solicitor as follows: "My client called on me some days ago and informed me that owing to a threatening notice (which, he said, he had showed to you) he could not complete. This was in addition to several verbal threats."

The two promissory notes signed by the defendant in respect of the deposit were kept by the auctioneer at his residence. During his absence, on April 30th, his residence was raided by armed men, who took away the notes. A document purporting to be signed by the Officer Commanding the 2nd Battalion, East Limerick Brigade, Irish Republican Army, addressed to the auctioneer, was handed to his servant. This document, having stated that the men had done everything possible to meet the auctioneer, and failed, went on to say: "Perhaps you can explain away how we were unable to meet you. Anyhow, the case we have to attempt to settle is urgent, and because of this urgency, and of the impossibilty of an interview with you, we were forced to enter your office and take therefrom two deposits of Clashdrumsmith sale, one valued £800, the other £27 10s. There is yet a sum of £10 outstanding, which can be arranged later." On May 2nd the Officer Commanding the 2nd Battalion informed the auctioneer by letter that he was not responsible for the raid.

On June 13th, 1923, the plaintiff issued the writ claiming specific performance, or, alternatively, damages for non-completion of the agreement. In his statement of claim the plaintiff pleaded that he had been always ready and willing to perform the contract on his part and to do all necessary acts and deeds for the purpose of transferring to and vesting the lands in the defendant. This was traversed by the defendant, who further pleaded that he had entered into the contract "under the belief (which said belief was induced by the representations and assurances of the plaintiff) that he, the defendant, would be allowed to enter peaceably upon the said lands and enjoy the same without claims, molestations, or threats by members of the plaintiff's family, or other persons. But immediately after, and upon several occasions since the making of the said contract, the defendant has been subjected to violence and threats by the sisters of the plaintiff and other persons, who, amongst other threats and acts of violence, have threatened to take the defendant's life should he attempt to enter upon the said lands." The defendant submitted that, in the circumstances, the enforcement of the contract would be inequitable, and would impose undue hardship upon him. He counterclaimed for rescission of the contract and the return of his deposit of £10. In his reply the plaintiff denied that he made the representations or assurances alleged by the defendant, and stated that the person or persons, if any, who subjected the defendant to violence or threats, had no right, title, or claim to the lands.

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At the trial of the action the defendant deposed that, prior to the signing of the agreement, representations had been made to him by the plaintiff and his agents that he would be allowed to enter peaceably upon the lands. The plaintiff, however, failed to remove cattle belonging to his (plaintiff's) sisters from the lands, and his sisters on several occasions showed their hostility to the defendant by attacking and abusing him. That in view of the purchase of the plaintiff's holding, the defendant decided to sell two holdings of which he was the owner, and he had these put up for sale by auction on the day fixed for completing the purchase from the plaintiff. That a purchaser was found for one of these holdings, but in consequence of the failure of the plaintiff to give clear possession to the defendant, the latter released the purchaser, and was released by him. And that, after the date fixed for completing the sale of the plaintiff's holding to defendant had passed, the plaintiff attempted to sell the meadow on the lands by public auction.

Overend K.C. and *C. Maguire,* for the appellant:—

The repudiation by the defendant on March 22nd, 1922, was not sustainable, inasmuch as the objection that the plaintiff was not ready and willing to give clear possession could not in any circumstances have been made before the date fixed for the completion of the contract: *Ellis* v. *Rogers* (1); *Smith* v. *Butler* (2). On March 22nd the plaintiff was discharged from further performance of the contract unless and until the defendant withdrew his repudiation. The defendant's subsequent conduct showed that he did withdraw the repudiation. The plaintiff was in a position to make title to the purchaser, and to compel any others who might be necessary parties to join in a conveyance of the lands to the purchaser: *In re Baker and Selmon's Contract* (3); *Stickney* v. *Keeble* (4).

J. M. Fitzgerald K.C. and *Shannon K.C.* (with them *Binchy*) for the respondent:—The representation by the plaintiff to procure the concurrence of his sisters was as binding as the terms of the contract itself: *Lamare* v. *Dixon* (5). A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or has been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract; any failure on his part bars his claim to specific performance: Halsbury, vol. 27, p. 52, par. 90. The vendor here was unable, on the date fixed for completion, to give the defendant clear possession; he failed to obtain the con-

(1) 29 Ch. Div. 661.
(2) [1900] 1 Q.B. 694.
(3) [1907] 1 Ch. 238.
(4) [1915] A.C. 386.
(5) L.R. 6 H.L. 414.

currence of his sisters, and his failure to obtain their goodwill had put the defendant in such a position that it would be a hardship to hold him bound by the contract: *Falcke* v. *Gray* (1); *In re Highett and Bird's Contract* (2); *Royal Bristol Permanent Building Society* v. *Bomash* (3). Time was of the essence of the contract in this case, and, if negotiations were continued after the time fixed for completion, this did not amount to a waiver of the condition that time was of the essence of the contract: *Dyas* v. *Rooney* (4).

Overend, in reply:—Even if time is of the essence of the contract the purchaser, by continuing negotiations after the date fixed for completion, waives it: *Webb* v. *Hughes* (5).

Dec. 12.

KENNEDY C.J.:—

This was a vendor's action for the specific performance of a contract for the sale of land. The lands, which comprised a holding in the County Tipperary, bought out under the Land Purchase Acts, and duly registered, were offered by the plaintiff for sale by public auction on the 18th March, 1922, subject to Conditions of Sale, which, amongst other things, appointed the 8th April, 1922, as the date for completion.

The highest bid at the auction did not reach the reserve price, and the property was withdrawn. Later, however, on the same day, the defendant, who had been one of the bidders, as a result of private negotiations, made an enhanced offer which was accepted on the part of the plaintiff. The defendant signed the contract at foot of the Conditions of Sale agreeing to purchase the holding for the sum of £3,350, and to pay the auctioneer's commission of £167 10s., and the sum of £837 10s. by way of deposit and in part payment of the purchase-money. The contract was also signed by Mr. Patrick J. Maher, the auctioneer, confirming the sale on behalf of the vendor.

The Conditions of Sale provided that the vendor should, within four days from the date of sale, deliver to the purchaser, or his solicitor, an abstract of title consisting of two documents, viz.: a certain deed of family settlement dated the 4th July, 1904, and a copy of the Land Certificate. The time for making requisitions on the title was limited to four days from the delivery of the said abstract. It was further provided that the purchaser should leave a draft of the assurance of the property to him at the office of the vendor's solicitor, Mr. Nicholas E. Maher, for approval, not less than six days before the 8th April, 1922.

The Conditions of Sale also contained the following provision: "The lands are sold subject to a right-of-way of

(1) 4 Drew. 651.
(2) [1902] 2 Ch. 214.
(3) 35 Ch. Div. 390.
(4) 27 L. R. Ir. 4.
(5) L. R. 10 Eq. 281.

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said Lizzie Guerin for all purposes in connection with the adjoining holding of said Lizzie Guerin (otherwise Eliza Guerin) and due provisions reserving this right-of-way to the said Lizzie Guerin (otherwise Eliza Guerin) will have to be embodied in the Deed of Transfer to the purchaser. The nature and extent of this right-of-way will be pointed out to the purchaser and explained to him at any time previous to the sale, and, whether the purchaser avails of such opportunity, or otherwise, he shall be deemed to have purchased with a full knowledge of its nature and extent, and shall not afterwards be free to make any objection or requisition in respect thereof." It is important to observe that the Particulars of Sale did not disclose that the sale was to be subject to any such right-of-way, nor did they refer proposing purchasers to the Conditions of Sale.

The plaintiff claimed specific performance of this contract and payment of the purchase-money, or, alternatively, damages for non-completion. He relies in his Statement of Claim on a letter of the defendant dated the 22nd March, 1922, as a renunciation of and refusal to perform the said contract, and on a letter of the 19th April, 1922, stated to be from the defendant's then solicitor, as repeating such renunciation and refusal. The plaintiff expressly pleads that he has always been ready and willing to perform the said contract on his part, and to do all necessary acts and deeds for vesting the lands in the defendant.

Upon the pleadings, the principal defence appears to be that the defendant was induced to enter into the contract on the faith of representations and assurances by the plaintiff "that he, the defendant, would be allowed to enter peaceably upon the said lands and enjoy the same without claims, molestations, or threats by members of the plaintiff's family or other persons." But it is alleged that "immediately after and upon several occasions since the making of the said contract, the defendant has been subjected to violence and threats by the sisters of the plaintiff and other persons," and it is submitted therefore that the enforcement of the said contract would be inequitable and would impose undue hardship upon the defendant. It is also pleaded that the plaintiff has never been ready, willing, or *able* to deliver clear possession of the lands to the defendant.

The defendant counterclaims for rescission of the contract and a return of his deposit. The amount of the deposit is stated in the counterclaim to be £10.

The plaintiff delivered a reply in which he deals specially with the deposit. He alleges that the deposit paid by the defendant amounted altogether to the sum of £837 10s., and that it was made up of two promissory notes, one for £800, the other £27 10s., and a cash payment of £10. This statement was proved in evidence, and is not denied. The pleading continues: "After the repudiation by the defendant of the said

contract . . . . a number or armed men broke and entered the residence of the said auctioneers in whose possession and custody, pending the completion of the contract, the said notes had remained, and took and carried away the said notes." The taking away of the notes in the circumstances alleged was proved in evidence, but there was no evidence as to the person by whom, or the motive with which, they were taken. The plaintiff's suggestion was that it was done by friends of the defendant in his supposed interest. The defendant's suggestion, on the other hand, was that it was done in furtherance of the alleged desire of the plaintiff's sisters to break the sale. We have not sufficient materials upon which to form an opinion one way or the other on the matter, and therefore this foolish outrage cannot affect our decision in the case.

Such was the position of the case on the pleadings when the action came to trial before Pim J., sitting as Chancery Judge, on the 23rd May, in the present year. The pleadings and the issues knit upon them appear to have been overlooked in the conduct of the trial. All sorts of evidence were offered and received without reference to them; and, without amendment, every possible issue which could be raised by evidence, untrammelled by pleadings, was treated as open to the parties on the hearing of the action, and so admitted on both sides here. The result is that we are confronted with a very large transcript of disorderly testimony which does not lend itself to systematic review in relation to any clear issues to be determined.

The principal matter which, as I read the evidence, undoubtedly affected the defendant's mind all through was his anxiety to buy the farm with the assent of the plaintiff's family. A man who buys what may be called a "family holding" in this country almost invariably has to consider the attitude of the vendor's family towards the sale. Few will venture the hostility of a vendor's brothers and sisters who think they have moral claims, even when they have no legal rights. Hence, one so often hears of a purchaser of a family holding having got, or not having got, "the goodwill" of the holding. It is not uncommon to hear that a purchaser has, in addition to the price paid to a vendor, paid something more to members of his family for "the goodwill." It is a reality of our social life, though it may not have legal recognition, and it cannot be ignored as a factor in these transactions.

The defendant is a farmer whose land is scattered, but he resides on land immediately adjoining the land in question. His motive in buying appears to have been to concentrate his farming round his residence and give up his outlying lands. But he knew the plaintiff and his sisters, and he knew that there had been some disagreement among them, especially upon the marriage of the plaintiff, an elderly man. I am satisfied that the defendant had some uneasiness on this score, and,

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after the auction had fallen through, when he was being urged to advance his offer, he decided to assure himself that, if he bought, he would buy with "the goodwill." That was the real object of his inquiries of Mr. Maher. He was informed that a deed had been executed settling the sisters' claims—and that was the case—but a legal settlement will not always dispose of the non-legal matter of goodwill. He signed the contract. Almost immediately after the contract was signed he began to experience hostility on the part of the plaintiff's sisters. The details of the manner in which that hostility was displayed are the subject of conflicting evidence, but are really immaterial. It is sufficient that there were, as I am satisfied, demonstrations of ill-will towards him by these ladies, one of whom could not conceal her hostile sentiments in the witness-box.

On the 21st March the vendor's solicitor, Mr. Maher, wrote to the defendant asking him what solicitor he wished to act for him, so that he, Mr. Maher, might furnish an Abstract of Title. Under the Conditions of Sale the abstract was to be delivered within four days from the sale, but it might have been delivered to the purchaser personally, and should have been so delivered, failing the nomination of a solicitor to receive it.

On the 22nd March the defendant wrote to Mr. Maher saying: "I have withdrawn from the purchase . . . I do not wish to be interfering in family affairs. His sisters threatened me several times since, and they wish that anybody would have it besides me, so I am not going to have hand, act, or part in it." This is the letter relied on in the Statement of Claim as a renunciation of the contract by the defendant. It was originally relied on here in the same way, but the plaintiff's counsel subsequently admitted he could not, having regard to what occurred afterwards, continue to rely upon it as a repudiation of the contract.

On the 23rd March Mr. Maher wrote to the defendant assuring him that the plaintiff's sisters had no conflicting interest, and requiring him to complete. On the 25th March the defendant visited Mr. Maher, and gave him particulars of his two outlying farms so that he might arrange for their sale on the 8th April, the day fixed for completing the purchase from the plaintiff. The two farms were, in fact, put up for sale. The sale of one was abortive, the reserve not being reached, while a purchaser was found for the other.

On the 27th March the defendant again visited Mr. Maher to complain of attacks by the plaintiff's sisters, made both on himself personally and at the house on the plaintiff's holding. Mr. Maher thereupon wrote to the late Mr. John O'Dwyer, who had been acting as solicitor for the plaintiff's sisters, complaining of the ladies' conduct towards the defendant—to whom Mr. Maher referred as "my client."

On the 8th April the defendant again saw Mr. Maher and

complained of the attitude of the Misses Guerin. Mr. Maher says he appeared to be very nervous, so he (Mr. Maher) gave him an old revolver he happened to have in the office, and this Mr. Maher describes as one of the steps he took for reconciling the defendant to his bargain.

In the meantime, when the defendant was in Mr. Maher's office on the 25th March, Maher's clerk asked him had he a solicitor, and he said he had Mr. D'Arcy. The clerk thereupon advised him to go down to Mr. John O'Dwyer, as, he said, "he is the only man that can quieten these women, and he will make it all right." The defendant then went with Maher's clerk to Mr. O'Dwyer, and, presumably, instructed him to act for him in the purchase from the plaintiff.

On the 10th April Mr. Maher, solicitor, wrote to Mr. O'Dwyer, solicitor: "Will you please let me have engrossment of deed in this case for signature by my client, and let me know when you will be prepared to close the sale," to which Mr. O'Dwyer replied on the 19th April, "My client called on me some days ago and informed me that owing to a threatening notice, which he said he had showed you, he could not complete. This was in addition to several verbal threats." This is the repudiation of the contract now relied upon.

Here it is important to observe that Mr. O'Dwyer was the solicitor for the plaintiff's sisters. He had acted for them in drawing up the deed of 1904 and an agreement of 14th March, 1922, which purported to solve the outstanding disputes between them and the plaintiff. Under these instruments they had charges to be released on a sale of the land. Yet no attempt seems to have been made to prepare draft releases of the charges for approval. Further, a right-of-way was agreed to be given to Lizzie Guerin over the lands sold, which was the right-of-way mentioned in the Conditions of Sale, and which was to be defined, both under the agreement of 14th March, 1922, and under the Conditions of Sale. Yet no attempt was made to define it. It was the plaintiff's duty to procure releases of the charges and to define the right-of-way to the satisfaction of Lizzie Guerin. His solicitor, Mr. Maher, should have taken the initiative in both these matters; and when Mr. Maher, without having taken these steps, called for an engrossment of the assurance to the purchaser, it was for Mr. Dwyer, whether as solicitor for the purchaser or as solicitor for the plaintiff's sisters, to have pointed out to him that these were necessary preliminaries to carrying out the sale.

Moreover, there were cattle all this time on the lands, some of which were the property of the plaintiff and some belonged to Lizzie Guerin. The defendant complained of this stock remaining on the lands, but owing to the failure of the plaintiff to agree with his sister as to which cattle were their respective properties, the lands were not cleared. Indeed, an attempt was made to induce the defendant to take the risk of clearing the lands himself, which he properly refused to do.

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The defendant was persuaded to transfer his business in relation to the sale to Mr. O'Dwyer on the ground that Mr. O'Dwyer alone could quieten these women. It is a remarkable fact that there is no trace of Mr. O'Dwyer ever having been able to reassure the defendant that he had nothing to fear from them, neither does it appear that Mr. O'Dwyer ever informed Mr. Maher, either before or after he acquired the defendant as a client, that he was in a position to concur in carrying the matter through on behalf of his female clients.

Finally, it does not appear that Mr. Maher ever furnished Mr. O'Dwyer with the abstract of title according to the Conditions of Sale, without which he could neither make requisitions nor draft the assurance to the defendant.

I am of opinion, in the first place, that the defence of representations, inducing the defendant to enter into the contract, is a real defence. I think the defendant did make it clear that he must get the goodwill of the family, in the sense I have mentioned, and that the plaintiff never was in a position to give him the lands with such goodwill.

In the second place, I cannot find that the plaintiff, or his solicitor, did anything towards carrying out the contract, and, in my opinion, the plaintiff's solicitor was not entitled to write the letter of 10th April, 1922, calling for an engrossment of the deed of conveyance, to which the letter of 19th April, relied on by the plaintiff, was a reply.

In these circumstances I would hold that specific performance should be refused.

But then we have the further facts of lapse of time and acquiescence in the repudiation of the contract.

Not until the 13th June, 1923, was the writ in this action issued, and, in the meantime, we have acts showing that both parties believed the whole transaction to be at an end. The plaintiff attempted to auction the meadow on the land. The defendant, who had agreed to sell one of his farms preparatory to completing this purchase, released the purchaser and was released by him. It would, in my opinion, be a hardship, and it would be inequitable for the Court now to say that this is still a living contract which the defendant must perform.

There is one matter on which I wish to add a word. It is my opinion that the defendant has suffered from acting upon the advice given him to leave his independent solicitor. We find him as client, first of one and then of another solicitor representing clients with interests adverse to his. If he had been quite independently advised, this case would have probably reached an earlier solution, and he would have been saved much trouble.

In my opinion the appeal should be dismissed with costs.

O'CONNOR J.:—

On the pleadings in this action, apart from formal traverses, the only issue raised is that the contract for sale of the lands was induced by a misrepresentation made by the plaintiff to the defendant that the latter would be allowed to enter peaceably upon the lands without claims, molestations, or threats by the plaintiff's family or other persons.

The trial of the action lasted three days, and the transcript of the very voluminous evidence shows that every conceivable topic was dealt with—so much so, that it is difficult to gather from the evidence what were the issues to which it was directed. It certainly was not confined to the only issue which was raised by the pleadings. An explanation is to be found in the way in which the trial, with the assent of both parties, was conducted. The pleadings were disregarded, and plaintiff and defendant were left at large without being called upon to formulate the issues by amended pleadings. The result seems to have been that no one at the trial seems to have had a clear conception of the material issues, and much time was wasted and the whole case obscured by evidence of the most rambling and confusing character. I consider this case to be a glaring example of the inconvenience resulting from the absence of proper pleadings raising the real issues to be tried. I do not wish to be taken as an advocate of rigid adherence to pleadings on which an action is brought to trial. Very frequently it appears at the trial that material issues have not been raised by the pleadings, and that it would be unjust to shut out the parties from raising them, but I do maintain that, when the proper issues become manifest, the parties should be called upon to formulate them by proper amendments. This is by no means a matter of merely formal compliance with rules. I know nothing which is more conducive to clear thinking, whether on the Bench or at the Bar, than the proper formulation of a legal claim or a legal defence, while there is nothing more calculated to lead to confusion and waste of time with consequent expense than to allow a case to drag along without exact knowledge of the issues which are raised.

Reading the evidence I am able to extract from it three grounds of defence which may easily be brought under well-defined heads:—1, Delay and laches on the plaintiff's part in bringing his action; 2, repudiation by the defendant and acquiesence by the plaintiff in such repudiation; 3, a change of position to the prejudice of the defendant caused by the plaintiff's conduct—a defence closely associated with defence No. 1. These do not exhaust the issues to be extracted from the evidence, but I will confine myself to them, as sufficient for the purpose of my judgment.

A contract for the sale of a farm is one which ought to be expeditiously carried out. A farm is a property which

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requires immediate attention and treatment. The times for doing things on a farm wait not for the farmer. He must always be up and doing. When he buys his farm he ought to get immediate possession. If he is delayed he may miss a sowing, or a reaping, or a market. Consequently, if there is a dispute between a vendor and purchaser of a farm, the purchaser should know at once whether he is to be on or off with his contract. He ought not to be kept in suspense.

In this case the contract was made on the 18th March, 1922. The date fixed for completion was the 8th April, 1922. Everyone knows that this is the time of year at which it is important for a farmer to get immediate possession. Immediately after the making of the contract the defendant had reasons for regretting it. It is not necessary to go into particulars. He repudiated it. He may at one time have withdrawn his repudiation, but it is certain that he finally, and in the clearest manner, repudiated it on the 19th April, 1922. This repudiation was met by a notice from the plaintiff that he would at once institute legal proceedings. I will assume that the plaintiff had then a good cause of action for damages for breach of contract or for specific performance. He might have rested on his claim for damages until it was barred by the Statute of Limitations; but, if he intended to seek the equitable relief of specific performance he was bound to proceed without delay. A man who sleeps on his rights does not find favour in a Court of equity.

The plaintiff, instead of proceeding as he had threatened the defendant that he would, did nothing to assert his rights until the 13th June, 1923, when he issued his writ. During the intervening period the defendant might very well have assumed that the plaintiff had abandoned his rights under the contract and had accepted the defendant's repudiation. It would certainly be a hardship on the defendant to have his fear of liability lulled, while in the meantime the plaintiff would have the option of selling the farm to advantage and, that failing, of enforcing the contract. On the ground of delay alone I think that the plaintiff is not entitled to equitable relief. There is ample authority to support this view: see Fry on Specific Performance, 6th edit., pars. 1071, 1072, and 1073. The length of the delay depends on the circumstances of each case, and, having regard to the nature of the property now in question, I am of opinion that the delay was altogether unreasonable. But the plaintiff's delay was accompanied by acts which are only consistent with his acquiescence in the repudiation and his election to treat the contract as at an end. A considerable time after the day fixed for completion of the contract the plaintiff advertised the meadows on the lands. That was wholly inconsistent with the defendant's rights under the contract if it were to be enforced against him. The letting of the meadows would have incapacitated the plaintiff from giving up clear possession.

Further, I am satisfied on the evidence that the defendant, acting under the belief that the contract was abandoned by the plaintiff, released a purchaser of one of his own farms, which he had agreed to sell, in consequence of the purchase of the plaintiff's farm—whether the defendant has suffered actual loss from this I do not know—but it was a change in position, which, with the other elements in the case, should be taken into consideration.

On these grounds alone I am of opinion that the plaintiff lost the right which may have been vested in him originally of getting a decree for specific performance, and I do not consider it necessary to give any decision on the defence of misrepresentation.

In my judgment the appeal should be dismissed with costs.

FITZGIBBON J.:—

I concur in the judgment just delivered by my brother O'Connor.

Solicitor for the appellant: *L. J. O'Neill.*
Solicitor for the respondent: *James F. D'Arcy.*

C. L.

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1924.
Dec. 16, 17.
1925.
Jan. 21, 22, 23, 28, 29, 30.
Feb. 2, 9.

JOHN CAHILL AND OTHERS *v.* THE ATTORNEY-GENERAL OF SAORSTÁT ÉIREANN, THE MINISTER FOR HOME AFFAIRS OF SAORSTÁT ÉIREANN, AND THE MINISTER FOR DEFENCE OF SAORSTÁT ÉIREANN.

Compensation—Dublin Metropolitan Police—Transfer from service of British Government to Provisional Government and Government of the Irish Free State (Saorstát Éireann)—Date of transfer—Rights of promotion, pay, and compensation on retirement — Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sects.* 9 (1), 55 (1), 60, *Sch.* 9—*Articles of Agreement for a Treaty between Great Britain and Ireland, Art.* 10—*Irish Free State (Agreement) Act*, 1922 (12 *Geo.* 5, *c.* 4), *Schedule, Art.* 10—*Constitution of the Irish Free State (Saorstát Éireann) Act*, 1922 (*No.* 1 *of* 1922), *Schedule I, Arts.* 73, 77, *and* 78, *Schedule II, Art.* 10—*Constitution of Saorstát Éireann as an original source of jurisdiction—Effect of British legislation after April* 1, 1922 — *Provisional Government (Transfer of Functions) Order*, 1922 (*Stat. R. & O.*, 1922, *No.* 315).

Plaintiffs, members and ex-members of the Dublin Metropolitan Police, claimed in an action against the Attorney-General and others a series of declarations (on behalf of themselves and other members of their class) as to their rights under Art. 10 of the "Articles of Agreement for a Treaty between Great Britain and Ireland" (hereinafter referred to as "the Treaty") and under the Constitution of the Irish Free State in respect of promotion, pay, and compensation on retirement.

By the said Art. 10 "the Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Government of Ireland Act, 1920, to . . . members of police forces . . . who are discharged by it or who retire in consequence of the change of Government effected in pursuance hereof."

By Art. 77 of the Constitution of the Irish Free State every existing officer of the Provisional Government (with certain exceptions) at the date of the coming into operation of the Constitution was on that date transferred to and became an officer of the Irish Free State, holding office by a tenure corresponding to his previous tenure. Art. 78 secured to such existing officers transferred from the British Government the benefit of the said Art. 10 of the Treaty.

It was conceded that the plaintiffs were "existing officers" within Art. 77 of the Constitution.

Held, as to promotion, that the discretion of the Chief Commissioner of Police has not been made subject to review in the Courts by the Treaty, or by the Constitution, or otherwise.

Held, as to pay, that plaintiffs were not entitled to a declaration of irreducibility of salary after their transfer to the Government of the Irish Free State. Conditions as to salary are not a matter of "tenure" within Art. 77 of the Constitution, and the provisions of the Government of Ireland Act, 1920, are inapplicable.

Held, as to compensation on retirement, that plaintiffs were entitled to a declaration as to the date of the "day of transfer" (determining the date for ascertaining "existing enactments") under the law relating to retirement of members of the Force in consequence of the change of Government; that that date was April 1, 1922 (the date agreed upon between the Irish and British Governments under the Provisional Government (Transfer of Functions) Order, 1922); that the expression "who retire in consequence of the change of Government" in Art. 10 of the Treaty must be given its full

meaning; that the question as to such retirement is one to be decided on the facts and circumstances of each case, and that the Rules as to compensation contained in Sch. 9 of the Government of Ireland Act, 1920, are (to the exclusion of the "statutory conditions" in that Schedule) the entire "terms" referred to in Art. 10 of the Treaty.

Held, further, that the Constitution of the Irish Free State must be recognised by the Courts as an original source of jurisdiction; that since April 1, 1922, the repeal by the British Parliament of an Act extending to the Irish Free State, including the partial repeal of the Government of Ireland Act, 1920, could not affect the question as to whether or not the Act continued to be in force in the Irish Free State; and, accordingly, that such, if any, of the provisions of that Act as are not inconsistent with the Constitution of the Irish Free State were adopted into the code of law of the Irish Free State under Art. 73 of the Constitution.

Meaning of "officer" and "tenure" discussed.

Plaintiffs, who were certain members and ex-members of the Dublin Metropolitan Police Force, brought this action against the Attorney-General, the Minister for Home Affairs, and the Minister for Finance, claiming, on behalf of themselves and their class, a series of declarations as to their rights under Art. 10 of the "Articles of Agreement for a Treaty between Great Britain and Ireland" (set out in the Second Schedule to the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), and in the Schedule to the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4)), and under Arts. 77 and 78 of the Constitution of the Irish Free State (set out in the First Schedule to the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922)), and in the First Schedule to the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1).

By the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), which was passed on the 31st March, 1922, it was provided (sect. 1, sub-sect. 1) that the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Schedule to the Act should have the force of law as from the date of the passing of the Act; and by sub-sect. 2, for the purpose of giving effect to Article 17 of the said Agreement, Orders in Council might be made transferring to the Provisional Government established under that Article the powers and machinery therein referred to (*i.e.* the powers and machinery requisite for the discharge of the duties of the Provisional Government). Pursuant to this power, the Provisional Government (Transfer of Functions) Order, 1922 (Statutory Rules and Orders for 1922, No. 315), was made, the material clauses of which are referred to in the judgment of Meredith J.

By Article 10 of the said "Articles of Agreement" (hereinafter referred to as "the Treaty") it is provided that "the Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 [the Government of Ireland Act, 1920] to judges, officials, members of police forces, and other public servants who are discharged by it or who retire in consequence of the

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change of Government effected in pursuance hereof . . .'' The terms of compensation accorded by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), are contained in sect. 60 of that Act (1), and by sub-sect. 4 of that section ''the provisions as to compensation contained in the Ninth Schedule to this Act shall apply with respect to the officers and constables of the Dublin Metropolitan Police and of the Royal Irish Constabulary who are serving at the day of transfer.''

By Article 77 of the Constitution of the Irish Free State it is provided that ''every existing officer of the Provisional Government at the date of the coming into operation of this

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(1) Sect. 60 (1)—All officers and constables of the Dublin Metropolitan Police and the Royal Irish Constabulary who are serving at the day of transfer shall, after that day, continue to serve on the same terms and conditions as theretofore, and shall be liable to perform the same duties as theretofore, and while so serving shall not receive less salaries than they would have received if this Act had not passed.

(2) Any existing enactments relating to the pay or pensions of officers and constables of the Dublin Metropolitan Police and Royal Irish Constabulary shall, after the transfer, continue to apply as respects any officer and constable serving at the day of transfer with the substitution of the Lord Lieutenant for the Treasury and for the Chief Commissioner or Inspector-General as the case requires.

(3) Where any such officer or constable, being qualified under the enactments aforesaid to retire on pension for length of service on or before the day of transfer, continues to serve after that day he shall, on retiring at any subsequent time, be entitled to receive a pension not less in amount than that to which he would have been entitled if he had retired on that day, and his right to receive such pension shall not, while he continues to serve, be liable to forfeiture, except in cases in which a pension when granted is liable to forfeiture under those enactments.

(4) The provisions as to compensation contained in the Ninth Schedule to this Act shall apply with respect to the officers and constables of the Dublin Metropolitan Police and of the Royal Irish Constabulary who are serving at the day of transfer.

(5) Any pensions and other allowances and gratuities which may become payable to officers and constables of the Dublin Metropolitan Police or the Royal Irish Constabulary after the day of transfer (being in either case officers and constables who are serving at the day of transfer) under the existing enactments applicable to them, and any compensation payable to any of those persons under the provisions of this Act, shall be paid out of moneys provided by the Parliament of the United Kingdom; but any sums so paid shall be made good by means of deductions from the Irish residuary share of reserved taxes in accordance with regulations made by the Treasury.

(6) The Pensions Commutation Acts, 1871 to 1882, shall apply to any member of the Dublin Metropolitan Police or Royal Irish Constabulary to whom an allowance is granted in pursuance of the provisions of this section in like manner as if he had retired from the permanent civil service of the Crown on the abolition of his office, and any terminable annuity payable in respect of the commutation of an allowance shall be payable out of the same funds as the allowance.

(7) In this section and in the Ninth Schedule to this Act the expression ''day of transfer'' means the day on which the control and management of the said forces are transferred from the Government of the United Kingdom, and the expression ''existing enactments'' means enactments in force at the day of transfer and includes any orders made under those enactments and in force on that day.

Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Éireann), and shall hold office by a tenure corresponding to his previous tenure." And by Article 78 "every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty."

The plaintiffs claimed the following declarations:—

1. A declaration that they, as members of the Dublin Metropolitan Police Force, are "existing officers" within the meaning of Art. 10 of the Treaty and Arts. 77 and 78 of the Constitution of the Irish Free State.

2. A declaration that, under the provisions of the Government of Ireland Act, 1920, the said Irish Free State Constitution, and the Treaty, the plaintiffs, while continuing to serve under the Irish Free State, are entitled, while performing the same duties as prior to the said Government of Ireland Act, to receive salaries on a scale not less than that in force at the date of the transfer of plaintiffs to the service of the Irish Free State.

3. A declaration that the plaintiffs are entitled, while serving under the Irish Free State as aforesaid, to receive pay according to a scale not less than the scale in force at the date of their transfer from the British Government.

4. A declaration that the Dublin Metropolitan Police Pay Order, dated 22nd February, 1924, is *ultra vires* and inoperative so far as it purports to reduce the plaintiffs' salaries.

5. A declaration that the Dublin Metropolitan Police Pensions Order of 22nd February, 1924, does not affect or alter the basis on which compensation payable to the plaintiffs is to be determined on their retirement by reason of the change of Government effected in pursuance of the said Treaty.

6. A declaration stating what the date of the "day of transfer" is under the existing enactments relating to the retirement of members of the Force entitled to retire in consequence of a change of Government.

7. A declaration that the members of the Force who were serving at the day of transfer and continued to serve after that date had the same right to promotion and to increased pay, according to years of completed service and rank, as if no change had taken place by the enactments effecting a change of Government in the Irish Free State.

8. A declaration that the Minister for Home Affairs had no power to prevent members of the Force who have accepted promotion or withdrawn previous notice to retire from retiring under Art. 10 of the Treaty and under Arts. 77 and 78 of the Constitution, and under the Government of Ireland Act, 1920.

9. A declaration that members of the Force who were deprived of promotion by reason of having notified their intention to retire are entitled on retirement to compensation on the basis of salary

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and rank that they would have had if such promotion had been granted to them in the ordinary course of the service.

10. A declaration that members of the Force who do not require the full period of six years to be added to their years of service to entitle them to the maximum pension of the rank they respectively hold or held on the day of their retirement are entitled to the benefit of Rule 2 (*b*) of the Rules of the Ninth Schedule of the Government of Ireland Act, 1920.

10A. A declaration in determining the "maximum allowance" to be given to the police officers retiring owing to change of Government under the Government of Ireland Act, 1920, the maximum allowance payable to them shall be two-thirds of their salary respectively, calculated under Rule 2 (*b*) of the Ninth Schedule to the said last-mentioned Act, without regard to any average annual amount of pay referred to in any Pensions Enactment or Order.

11. A declaration that the members of the Force who are otherwise entitled to retire from the Force by reason of the change of Government are not debarred from doing so, either by accepting promotion or by having withdrawn notices of their intention to retire which they had previously given, and that members of the Force who have statutory rights to retire can retire, as of right, at any time within the period of two years of the day of transfer, if they have complied with the statutory conditions.

12. A declaration that the provisions of the Dublin Metropolitan Police Pensions Order, 1922, do not apply to the plaintiffs and the other members of the Force whom they represent, who retire consequent on a change of Government.

13. A declaration that the provisions of the Pensions Commutation Acts, 1871 to 1882, apply to compensation granted to members of the Force retiring by reason of the change of Government, and that the Government are bound to give effect to such provisions.

The defendants pleaded that no member of the Force was entitled as of right to promotion, that the Government of Ireland Act, 1920, had been repealed by the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), and that all awards of compensation and all salaries had been duly made, adjusted, and fixed according to law. Defendants further submitted that plaintiffs' claims were not within the jurisdiction of the Courts, and were not enforceable by action.

Blood K.C. and *Price K.C.* (with them *James Henry*), for plaintiffs.

Serjeant Hanna K.C. and *Overend K.C.* (with them *Costello*), for defendants.

Cur. adv. vult.

1925.

Feb. 9.

MEREDITH J. :—

This action has been brought by certain members and ex-members of the Dublin Metropolitan Police, who claim to have

been existing officers of the Provisional Government to whom Article 78 of the Constitution applies, and it has been brought for the purpose of establishing, by means of a series of declarations which the Court is asked to make, the rights, both of the plaintiffs and of all other members of the class which they represent, under Articles 77 and 78 of the Constitution and Article 10 of the Treaty. The rights in question relate to three matters, namely: (*a*) the pay which such members of the Force are, or were, entitled to receive while continuing in the service of the Irish Free State, (*b*) the promotion to which they were entitled during such continued service, and (*c*) the compensation to which they are entitled on retirement.

The defendants raised the preliminary point that the matters at issue are not justiciable by this Court. That is an objection which would probably have to be allowed if the plaintiffs were only relying on their rights as guaranteed by Article 10 of the Treaty. But as regards the first of the three matters, namely that of pay, the provisions of Aricle 10 of the Treaty, which only deal with compensation on discharge or retirement, are clearly not relevant, although paragraph 2 of the prayer does refer to the Treaty. The rights claimed are claimed under Article 77 of the Constitution, and, having regard to Article 65, which provides that "the judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution," it was certainly a courageous contention that the Court could not, if it saw fit, make the declaration sought in the fourth paragraph of the prayer, namely, "that the Dublin Metropolitan Police Pay Order of 22nd February, 1924, is *ultra vires* and inoperative so far as it purports to reduce the plaintiffs' salaries." As to the third matter, namely, that of the compensation to which the plaintiffs are entitled on retirement, the plaintiffs are relying not merely on Article 10 of the Treaty, but on Article 78 of the Constitution, and if they are "existing officers" within the meaning of that Article, and so have the benefit of its provisions, I am bound to follow my decision in *Wigg and Others* v. *Attorney-General and Others* (1), and disallow the objection. Now, obviously with a view to preventing any adverse decision on that point affecting the defendants on the question of costs, their counsel have clearly and definitely stated that the defendants admit that the plaintiffs are "existing officers" within the meaning of Article 77, who were transferred from the British Government by virtue of a transfer of services to the Provisional Government. I need not go behind that admission, although I myself feel considerable doubt on the point. But, as the matter is not in dispute, I shall not make a declaration on the point, as it seems clearly objectionable to make declarations as to the construction or interpretation of Articles of the Constitution on important and difficult points merely on consent or on admissions. As to the

(1) 58 Ir. L. T. R. 130.

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second matter, namely, that of promotion, the objection is unanswerable. There is nothing in any of the statutory provisions to which the attention of the Court has been called to suggest that the discretion of the Chief Commissioner in granting or not granting promotion is to be subjected to review, directly or indirectly, by the Court. Accordingly the matters to be considered are reduced to two, namely, matters relating to pay during service and compensation on retirement.

As the case put forward on behalf of the plaintiffs in respect of both matters is made to turn on the provisions of the Government of Ireland Act, 1920, it will be convenient at the outset to consider the position of that Act and the extent to which its provisions can have any bearing on the questions at issue. Does that Act form any part of the legal code which is administered by these Courts? These Courts were established under the Constitution enacted by Dáil Éireann by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922). That Constitution must be recognised by these Courts as an original source of jurisdiction, and, as regards the whole code of law to be applied, it is the one and all-sufficient root of title. Now, what is the actual code of law that came under the cognizance of the Courts by virtue of that Constitution? That is to be ascertained by looking at Article 73: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." Now, was the Act of 1920, either as a whole or to the limited extent of any of its provisions which may not be inconsistent with the Constitution, in force in Saorstát Éireann at the date of the coming into operation of the Constitution? As to this question, the defendants originally contented themselves with relying on the repeal of the Act of 1920, as far as Southern Ireland is concerned, by the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2). But at the date that Act was passed the British Parliament might have repealed all statutes applying to Ireland without in any way affecting the question as to what statutes were in force in Saorstát Éireann at the date of the coming into operation of the Constitution. Since the 1st April, 1922, the British Parliament may have repealed several statutes applicable to Ireland. But that is the concern of the British Parliament; it has not affected matters over here. We have gone on with the administration of our own legal code, which, however, adopted the British legal code up to a certain point. If the Act of 1920 had any force or operation in Saorstát Éireann prior to the Irish Free State (Consequential Provisions) Act, 1922, as the defendants' reliance on the repeal by that Act would imply, that force or operation could not be affected by the repeal in question, because

that force, if any, and such as it was, was derived from clause 13, sub-clause 1, of the Provisional Government (Transfer of Functions) Order, 1922 (1), which, for the purpose of carrying out the provisional arrangement under the Treaty, provided for the continuance of all existing laws, institutions, and authorities in Southern Ireland, subject to any Act of the Provisional Parliament and to the provisions of that Order and any other Order made under the Irish Free State (Agreement) Act, 1922. The Provisional Parliament never repealed the Act of 1920. But the provisions of the Treaty, which were contained in the Schedule to the Irish Free State (Agreement) Act, 1922, were sufficient to prevent the Act as a whole getting over the first stile. So the only question is as to which, if any, of the provisions of the Act of 1920 had, after the 1st April, 1922, such a lingering existence in Saorstát Éireann as raises any question as to their adoption into our code under Article 73 of the Constitution. As I desire to avoid *obiter dicta*, I shall confine my observations to sect. 60 of the Act of 1920 and the Ninth Schedule. This Schedule is dependent on sect. 60, and that section is dependent on the arrival of the "day of transfer" defined in sub-sect. 7.

That brings me to what was the kernel of the plaintiffs' case on the question of pay. The expression "day of transfer" is defined to mean "the day on which the control and management of the said forces are transferred from the Government of the United Kingdom." This definition the plaintiffs construe as if they could detach sect. 60 and the Ninth Schedule from the entire context of the Act of 1920, and so treat these provisions relative to the Force as if they were in the same position as a separate and distinct Police Act taking its place in the general code applicable to the Force. Having thus detached these provisions, they then attach them to the subsequent Irish Free State (Agreement) Act, 1922, and the Transfer of Functions Order of 1922, and give the definition of "day of transfer" meaning and application by association with clauses 6 and 10 of that Order. But, taking the provisions in detachment, the definition has no meaning, for it contemplates a particular day on which a transfer is to take place, and that must be in accordance with some provision already enacted. The provision is in fact to be found in sect. 9, sub-sect. 1, of the Act of 1920, which provided that the Royal Irish Constabulary and the Dublin Metropolitan Police were to be reserved services until such date, not being later than the expiration of three years after the appointed day, as His Majesty in Council might determine, and on the date so determined were to be transferred from the Government of the United Kingdom to the Government of Southern Ireland as respects Southern Ireland. As far as Southern Ireland is concerned, no Order under that section was ever made, and accordingly there was no transfer to the Government of Southern Ireland;

(1) Statutory Rules and Orders for 1922, No. 315.

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and, consequently, unless the provisions in question were subsequently modified and adapted, as they were not, they could only have a continuing life on the terms that the Dublin Metropolitan Police is still a reserved service, which is inconsistent with its transfer to the Provisional Government. This shows the absurdity of supposing that the provisions in question of the Act of 1920 could have been continued under clause 13, sub-clause 1, of the Transfer of Functions Order, 1922. But even clause 10, sub-clause ii, which deals with the transfer of the Force to the Provisional Government, makes that plain. For it treats the provisions as to compensation in sect. 60 of the Act of 1920 as no longer effective, and provides that on the transfer which it effects terms of compensation are to be accorded not less favourable than those accorded "*in like circumstances*" by the Act of 1920. According to the contention of the plaintiffs, the circumstances provided for were the *very* circumstances under which the provisions of the Act of 1920 were to apply, and did apply. To pursue the matter further would only be like tilting at a windmill; and I have only dealt with the point at such length because it is the pivot on which a large part of the plaintiffs' case turns.

As sect. 69 and the Ninth Schedule of the Act of 1920 were not continued under clause 13, sub-clause i, of the Transfer of Functions Order, no question can arise as to their continuance by virtue of Article 73 of the Constitution. But, although the provisions of the Act of 1920 cannot apply directly, the terms specified in the Ninth Schedule are certainly material on the question of compensation for the purpose of comparison with terms actually offered to the plaintiffs, in order to ascertain whether the plaintiffs are being accorded their full rights under Article 10 of the Treaty, and in that indirect way the terms of the Ninth Schedule are attracted by Article 10 of the Treaty and by Article 78 of the Constitution—assuming always that the plaintiffs are "existing officers" within the meaning of Article 78. Mr. Price argued on behalf of the plaintiffs that the provision of Article 77 of the Constitution as to every existing officer within the Article holding office after transfer "by a tenure corresponding to his previous tenure" also in a similar manner attracts the provisions of sect. 60, sub-sect. 1, of the Act of 1920. The contention amounts to this, that under Article 77 there is a throwback to the position under the Transfer of Functions Order, and from that a further throwback to the position under the Act of 1920. Thus, although the question of a direct application of the Act of 1920 has been disposed of, questions as to its indirect application still hold the field. These must be dealt with, as they arise, on the two main questions of pay during service and compensation on retirement.

The terms of sect. 60, sub-sect. 1, to which the plaintiffs contend there is a throwback under Article 77 of the Constitution, are terms which they say guarantee them after transfer

salaries on a scale not less than that in force at the date of transfer. Now, under Article 77 they are in the first instance thrown back on their position under the Transfer of Functions Order, 1922. In this position they have to rely either on a direct application of the provisions of the Act of 1920 by virtue of clause 13, sub-sect. i, of the Order, or on an indirect application by virtue of a second throwback under clause 7, sub-clause ii, which provides that where an officer is transferred to the Provisional Government under the Order he shall hold office by a tenure corresponding to his previous tenure. The first alternative has been already considered in dealing generally with the possibility of a direct application of the Act of 1920. The second is even more obviously futile, because the provisions of sect. 60, sub-sect. 1, as to irreducibility of salary, unlike those in sect. 54, sub-sect. 1, which took effect from the passing of the Act, and unlike those of sect. 55, sub-sect. 1, which took effect from the "appointed day," were expressed to take effect only *after* the day of transfer. Consequently, even if the day of transfer under the Order could be substituted for that under the Act of 1920, the throwback under clause 7, sub-clause ii, of the Order, which is to the position *before* the day of transfer, would be a throwback to the wrong side of the line.

Consequently any argument under Article 77 of the Constitution based on the words "hold office by a tenure corresponding to his previous tenure" must be made to operate independently altogether of the Act of 1920. But before dealing with it from that point of view, I must, to avoid misapprehension, point out that the provisions of sect. 60, sub-sect. 1, are misread in paragraphs 2 and 3 of the prayer. That sub-section says nothing about salaries on a scale not less than that in force on any day of transfer. That would be a simple thing to say, and, where the Act intended to say that, it said it in that way. Thus in sect. 54, sub-sect. 1, the words are simply "and shall continue to receive the same salaries, gratuities, and pensions ... as before that date." But in sect. 60, sub-sect. 1, the words are: "and while so serving shall not receive less salaries than they would have received if this Act had not passed." These words only gave the plaintiffs, in certain events, the benefit of existing enactments, coupled with protection against provisions prejudicially affecting their salaries contained in enactments or Orders that could only take effect by virtue of the Act of 1920. But the Dublin Metropolitan Pay Order of 1924, dated the 22nd day of February, 1924, which was made by the Minister for Home Affairs, with the concurrence of the Minister for Finance, was not an Order in any way dependent upon the passing of the Act of 1920. No jugglery with the words of Article 77, and no throwback from those words to the provisions of sect. 60, sub-sect. 1, could enable the plaintiffs to make those words equivalent to a provision that after the coming into operation of the Constitution they were to continue to receive salaries not less than

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those which they would have received if the Constitution had not passed. But that is what their argument is required to do if they are to find a ground for impugning the Pay Order of 1924.

The point upon which the defendants mainly relied was that the plaintiffs' contention that the expression "tenure" as used in Article 77 includes terms and conditions as to salary is altogether untenable. Certainly a condition as to irreducibility of salary—which is the condition claimed—is not an incident of the tenure of an office in the ordinary acceptation of the term. How an office is held is a question of tenure—a question as to what may be done about the salary is only a question of what the office is worth. The tenure of an office might remain the same although, from being highly lucrative, it became purely honorary. The change would not affect the tenure, though it might afford an inducement to retire from the office. Appropriate to this distinction there is a difference in the prepositions used in technical descriptions of the relation; for an office is said to be held *by* a tenure, but *upon* terms and conditions. Is the word "tenure" then used in an exceptional sense in Article 77, where the apparently technical phrase is used, "shall hold office by a tenure corresponding to his previous tenure"? It is obviously used in its ordinary sense in Article 75 of the very same instrument, where these words occur: "hold office by the like tenure *and upon the like terms* as heretofore." Again, the "Provisions as to members of Police" contained in sect. 60 of the Act of 1920, in contradistinction to the "Provisions as to existing Judges and Officers," make no reference at all to tenure, and only speak of the officers and constables continuing to serve on the same terms and conditions. In sect. 55, where provision is made for "existing Irish officers" continuing to hold their offices "by the same tenure and upon the same terms and conditions (including conditions as to salaries and superannuation) as theretofore," the usual technical distinction is preserved. The same observation applies to clause 8 of the Provisional Government (Transfer of Functions) Order, 1922.

The reason why I prefer to rest my decision on grounds other than that of the technical meaning of the word "tenure" as contrasted with "terms and conditions" is that if the expressions "existing officer" and "hold office by a tenure corresponding to his previous tenure" apply at all to members of the Police, then Mr. Price, who made every possible point for the plaintiffs, is certainly justified in his contention that "tenure" is used in an extraordinary sense. In all the statutes the members of the Force are simply referred to as serving on certain terms and conditions, and if such service is to be described as service in an office held by some kind of tenure, I cannot see what the term "tenure" can seize on unless it embraces something of the terms and conditions. I think the term would be misapplied to service in the Police Force. But I think the term

"officer" in the sense of a person who holds an office would be equally misapplied. No doubt the term "officer" is used in various senses, according to the relation contemplated. Thus a person may be described as an "officer" in relation to the person or body from whom or which the office is held, or in relation to duties to be performed, or in relation to subordinates in rank, and he may be an officer in one sense and not in another. While members of the Force are often described as officers when the second or third relation is contemplated, I have not been shown any precedent for their being called officers in contemplation of the first relation. But if "officer" has the very wide meaning for which the plaintiffs contend, and which the defendants admit, then the word "tenure" may have a correspondingly wide meaning.

But there is no need to stress the technical meaning of the term "tenure." For even if the words of Article 77 had been as strong as those in sect. 55, sub-sect. 1, of the Act of 1920, it would not have helped the plaintiffs' case. The words there used were: "continue to hold their offices by the same tenure and upon the same terms and conditions (including conditions as to salaries and superannuation) as theretofore." Yet even those words themselves could only have the effect of continuing the tenure, terms, and conditions from the time before the transfer to the time after. They do no more than bridge the dividing stream, and are simply transitory provisions, ensuring a smooth transition. They would not by themselves have the effect of preventing the passing of any future Act of the Provisional Parliament, or the making at any subsequent time of any regular Order changing the salaries. Accordingly the words in sect. 55, sub-sect. 1, in order to have a prohibitive effect, had to be supplemented by the words at the end of the section: "and while performing the same or analogous duties shall receive not less salaries than they would have received if this Act had not passed." If the plaintiffs' argument as to the interpretation of Article 77 is correct, then the words just quoted in sect. 55, sub-sect. 1, were superfluous.

That the words of Article 77 could not have had the prohibitive effect attributed to them by the plaintiffs unless the intention was clearly expressed must be apparent. The object of the transitory provisions was only to effect a smooth transition and to ensure the fulfilment of Treaty obligations connected with the transfer. Article 10 of the Treaty confers very substantial privileges, and privileges that afford the most ample protection, and it would be difficult to conceive that Article 77 of the Constitution would gratuitously supplement those rights by rights of the nature contended for by the plaintiffs. If such supplementary provisions were thought desirable, that would have been a matter to be subsequently dealt with by the Oireachtas. This aspect of the question becomes even more plain when it is remembered that the plaintiffs' contention applies equally to

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clause 7, sub-clause ii, of the Provisional Government (Transfer of Functions) Order, 1922. The scope of that Order is controlled by Article 17 of the Treaty, and is limited to transferring to the Provisional Government the powers and machinery requisite for the discharge of its duties.

Of the various points made on behalf of the plaintiffs in this connection, that which gave me most pause was the one that derived its force from the provision in the Ninth Schedule that in effect enabled members of the Force to be retained, whether they liked it or not, for a period of two years. The provision referred to was as follows: "The retirement must not take place until at least six months after the notice of retirement has been given, and may be postponed by the Lord Lieutenant, if he thinks fit, to any later date not being more than two years after the day of transfer." During these two years at least, as was argued, the remedy of retirement, if conditions were not satisfactory, was in abeyance. If during that period salaries were not protected against reduction, then for the time being the members of the Force were completely at the mercy of the State, which was directly contrary to the spirit and obvious intention of the Treaty. Hence the words, "hold tenure by a tenure corresponding to his previous tenure," in clause 7, sub-clause ii, of the Transfer of Functions Order of 1922 must be construed as ensuring irreducibility of salary, and the same words in Article 77 must be similarly construed. The answer is that the statutory conditions in the Ninth Schedule to the Act of 1920 were not attracted by Article 10 of the Treaty. If the members of the Force were compulsorily retained under those conditions, then they were so retained under a misapprehension. The power, in effect, of compulsory retention, with its correlative, irreducibility of salary, which were appropriate enough in such an Act as the Government of Ireland Act, 1920, would have been impossible in the Transfer of Functions Order, which was merely an implementing of the Treaty under Article 17. The difference as to content, origin, and significance between the Act of 1920 and the Treaty and Constitution deserves to be better appreciated.

I now come to the second branch of the case. As most germane to the matters just considered, I shall deal first with the conditions entitling "existing officers" under Article 78 of the Constitution to be paid fair compensation on terms not less favourable than those accorded by the Act of 1920. The construction put by the plaintiffs on Article 78 of the Constitution comes to this. The class to receive the benefit is defined by the words, "Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government." The benefit is to be paid "fair compensation on terms not less favourable than those accorded by the Act of 1920." Having ascertained the class and the benefit, nothing remains but to look to the Act of 1920 to ascertain

the terms. These terms are contained in the Ninth Schedule to the Act. The Schedule contains a set of Rules, in accordance with which compensation is to be awarded to the persons entitled, having regard to the specification of classes and conditions contained in the paragraphs of the Schedule preceding the Rules. Those Rules, in accordance with which compensation is accorded under the Act of 1920, seem so obviously the terms referred to in Article 10 that I should not have thought it necessary to go minutely into the question but for the fact that not only the plaintiffs, but also the defendants, seem to pay regard to the specification of classes and conditions as the exigencies of their arguments require. The plaintiffs look to these conditions as an escape from the condition of Article 10 of the Treaty as to retirement being in consequence of the change of Government, and the defendants look to them for the purpose of justifying a refusal to allow the plaintiffs to retire with the benefit of Article 10 for a period of two years from the day of transfer. But the statutory conditions in the Ninth Schedule are part of the terms referred to in Article 10 or they are not, and they must be accepted or rejected in their entirety. The statutory conditions are, in fact, only part of the specification of one of the sub-classes who are to benefit, and the detachment of the enumeration of the conditions is only a matter of convenience in drafting. Indeed, this is made clear by the language itself. For the sub-class to which the statutory conditions apply is: "Any officer or constable who after the day of transfer retires voluntarily under the conditions in that behalf hereinafter contained." The words, "who after the day of transfer," &c., are as much part of the definition of the class in the Ninth Schedule as the words, "who was transferred from the British Government by virtue of any transfer of services to the Provisional Government," are part of the definition of the class in Article 78. Hence the statutory conditions in the Ninth Schedule do not belong to the terms accorded by the Act of 1920, but to the definition of a class that was to have the benefit of those terms. The Act of 1920 says nothing about retiring in consequence of the change of Government, but specifies conditions of retirement which achieved a similar object indirectly. Article 10 of the Treaty went straight for the same object by means of a direct statement. That statement governs the application of Article 78 of the Constitution and Article 10 of the Treaty, and is in entire substitution for the indirect statement in the Ninth Schedule.

Retirement in consequence of the change of government being one of the facts investive of the plaintiffs' title to compensation, and no definitive conditions similar to the statutory conditions in the Act of 1920, which would enable the question to be determined by the mere direct or mechanical application of a formula, having been specified, it is not possible for the Court to make general declarations that this or that matter, such as acceptance of promotion, should, or should not, be taken

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into consideration in determining the question of compliance or non-compliance with the condition. The facts and circumstances of each individual case must be considered. A glance at the declaration sought in paragraph 11 of the prayer will make the matter plain. "A declaration that the members of the Force, who are otherwise entitled to retire from the Force by reason of the change of Government, are not debarred from doing so, either by accepting promotion or by having withdrawn notices of their intention to retire which they had previously given, and that members of the Force who have statutory rights to retire can retire, as of right, at any time within the period of two years after the day of transfer, if they have complied with the statutory conditions." Now, if the statutory conditions prescribed by the Act of 1920 could be substituted for the direct, but unelucidated, condition specified in Article 10 of the Treaty, I do not apprehend that there would be any difficulty in making a declaration of that sort. But once the statutory conditions are out of the question such a declaration becomes clearly impossible. I was asked to treat the words "in consequence of the change of Government effected in pursuance hereof" as a mere piece of colourless description. But then, leave them out altogether and the Article would make the Government give the exceptional compensation to all officials who were discharged by it or who retire. The words in question are what distinguish the perfectly intelligible provisions of Article 10 from such sheer nonsense. The words must, therefore, be read as charged with the full meaning they bear on their face. The extent to which there must be resort to their effect may be seen by looking at Article 76 of the Constitution. A lacuna left by the wording of Article 10 of the Treaty was filled by Article 76, which provided that if a Judge was not, with his consent, appointed to be a Judge in the new Courts he was to be treated as if he had retired in consequence of the change of Government. Now, suppose that a Judge were so appointed with his consent and ten years after retired from age, or infirmity, or any such cause, would he be entitled to the benefit of the provisions of Article 10? That question could only be decided by reference to the words "retire in consequence of the change of Government," and it could only be so decided on the facts and circumstances of the case. The difference between such a case and the case of a member of the Police Force who accepted promotion after the transfer is a difference only of degree not of kind. There are a variety of matters to which a tribunal that had to decide the question of fact might or might not attach importance. I could mention several matters that would seem to me to be probably very relevant, but I shall content myself with pointing out that the plaintiffs took considerable pains to show that such promotion as any of them received came to them unsought. But if the question of fact, whether promotion was sought or simply came dropping down "like the gentle rain

from heaven," is material to the question of retirement in consequence of change of Government, then the same must apply to a number of other questions that readily suggest themselves. Mr. Blood argued with much force that it cannot have been the intention that the minds of retiring members of the Force were to be probed to discover the secret motive underlying a notice of desire to retire under the provisions of Article 10. That may be conceded. But if there was an official statement that notice of intention to retire in consequence of the change of Government was to be given not later than the 5th December, 1924, and if, as appears, forms were issued headed:—"Application for Compensation under Article 10 of the Treaty," and if these forms put the definite question: "State is retirement in consequence of the change of Government," it does not appear that there was any intention not to accept a direct statement in answer to the question as *primâ facie* evidence—only to be challenged by showing some definite act or acts inconsistent with the statement, and only consistent with a waiver of the right to retire under Article 10 and an election to continue in service under the new Government and irrespective of the change. It was suggested that even if I felt bound to hold, as I do hold, that the question is one of fact I might nevertheless by means of general declarations lay down some general principles such as that the acceptance of promotion was not in itself a bar to retirement with the benefit of Article 10. Now, no doubt, a tribunal, or tribunals, deciding different cases on facts in every way similar would give similar decisions, and in accordance with those decisions, as precedents, general principles, with all the appearance of judicial rules in lieu of statutory conditions, would emerge, but such principles can only be made to emerge in that way, and it is not competent for a Court that, in a representative action of this kind, has not to decide the cases of particular plaintiffs on the facts of their particular cases, to lay down in advance any principles which would dictate rules and prescribe the lines on which evidence as to the fact in question should be reviewed by other tribunals. For these reasons I must decline to make the declarations sought in paragraphs 8 and 11 of the prayer.

The Rules in the Ninth Schedule to which we have to look in order to see what were the terms accorded by the Act of 1920, adopt, with specified modifications, what are referred to as "the existing enactments," and this expression is defined in sect. 60, sub-sect. 7, to mean "enactments in force at the day of transfer and includes any orders made under those enactments and in force on that day." Hence, it is necessary to ascertain what, under the circumstances under which Article 10 of the Treaty is to be applied, is to be taken as the "day of transfer" contemplated and defined in sect. 60, sub-sect. 7. The plaintiffs cannot know what their rights are until that question is determined, and consequently they are entitled to a declaration

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on the point. Such a declaration, in fact, well illustrates the type of declaration which may properly be made in an action of this kind. An official communication dated 3rd October, 1923, adopts the view that there were two dates of transfer. "There are two dates of transfer—1, 1st April, 1922, the date of transfer to the Irish Provisional Government, and 2, 6th December, 1922, the date of transfer to the Irish Free State Government." The originator of this view can hardly have appreciated that this might involve the application of different "existing enactments." But Article 10 of the Treaty, Article 78 of the Constitution, and Clause 10, sub-clause ii, of the Provisional Government (Transfer of Functions) Order, 1922, all plainly contemplate one transfer only as material to the question of compensation, and that is the transfer to the Provisional Government referred to in Article 17 of the Treaty. That transfer took place on the 1st April, 1922, and the plaintiffs are entitled to a declaration that, for the purpose of a reference under Article 10 of the Treaty to the terms accorded by the Act of 1920, the 1st April, 1922, must be taken as the day of transfer.

Accordingly, the enactments that have to be taken into account are those in force on the 1st April, 1922. That is important because one of the main issues in the case is that of the applicability of the Dublin Metropolitan Police Pensions Order, 1922, which is dated 16th March, 1922. Clause 19, sub-clause i, of that Order provided that the scale of ordinary pensions prescribed by the Order for members of the Force should not apply to any person who became a member of the Force before the 1st day of July, 1919, and was serving as such at the commencement of the Order, unless within three months after the date on which the Order was made he gave notice in writing to the Chief Commissioner of his desire that those provisions should apply to him, and that where no such notice was given the provisions of the existing Acts relating to the scales of ordinary pensions and gratuities should continue to exist. With one exception the plaintiffs all gave the notice within the prescribed three months, but after the 1st April, 1922, and, accordingly, they contend that the provisions did not apply to them and were not in force as against them on the 1st April. The importance of that fact is emphasised by the significant introduction of the express words "applicable to him" following the words "existing enactments" in the Ninth Schedule. This argument would have been more plausible if Clause 19 had said that the *Order* should not apply to those who did not give notice, instead of merely saying that a certain *scale* should not apply to them and that the provisions of the existing Acts relating to the scales of ordinary pensions and gratuities should continue to apply. The plaintiffs' case against the application to them of the Order of 1922 pivots on the definite misstatement of Clause 19, sub-clause i, contained in paragraph 16

of the Statement of Claim that the *Order* was stated not to apply unless the notice was given. In point of fact the Clause says in express words that the Order "shall apply to members of the Force who were serving as such at the commencement of this Order, as well as to persons becoming members after the commencement of this Order." If, then, attention has to be paid to the express words the plaintiffs could only have escaped the consequences of the Order being in force on the 1st April, 1922, and of their own election to give the prescribed notice, if the Ninth Schedule had in this connection contained a provision similar to that in the Eighth Schedule, Part I (C) of the Rules, par. 1. It was to the effect: "An officer to whom the Superannuation Act, 1909, applies by reason only of his having elected to adopt the provisions of that Act shall, if he so requires, be treated for the purpose of the determination of his compensation under this Schedule as if he had not so elected." But the absurdity of such a provision relating, not to a past election made at a time when the transfer and the special provisions relating thereto could not have been in contemplation, but to an election to be made after the passing of the Act and with full knowledge of the consequences, must be apparent. Any shadow of grievance which the plaintiffs have in connection with the application of the Order of 1922 to them must, on the most sympathetic analysis, resolve itself into a complaint that, while it was all right that in the Act of 1920 "existing enactments" should have been defined by reference to the "day of transfer," in the Treaty they should by a special proviso have been defined by reference to the date of the ratification of the Treaty. The recitals in the preamble to the Order of 1922 are the answer to that complaint.

The plaintiffs in their reply attempt to escape the consequences of giving the prescribed notice by saying that the notice was only to take effect in the event of their not retiring by reason of change of Government, and qualifying for an ordinary pension on completed years of service. But it was precisely on the provisions that on the day of transfer would take effect in precisely such an event that the provisions of the Ninth Schedule were intended to be based, and it was precisely a scale so to take effect that was modified and rendered more beneficial by the provisions as to added years and amount of salary. The whole scheme of the Ninth Schedule was to look in the first instance to the manner in which the claimant's pension would be calculated if at the day of transfer he retired for length of service, and then to give him the benefit of certain special provisions. The defendants are not seeking to apply the Order of 1922 without the benefit of the added years and so forth.

The case of the plaintiff, Robert Forrest, raises on its facts a clear question which, though fully argued, is not precisely covered by any of the declarations sought, though I was informed

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at the hearing that it is the question intended to be covered by paragraph 10 of the prayer. This plaintiff's pay at the date of retirement was £350 per annum, and his allowance was fixed at £233 6s. 8d., computed on two-thirds of that pay. The plaintiffs, however, contend that the overriding maximum prescribed in Rule 4 of the Ninth Schedule should be applied, not to the actual *annual pay* at the date of retirement, but to the *salary* of the retiring member of the Force, which, in accordance with Rule 2 (*b*), is to be taken at the amount which it would have reached if he continued to serve in the same rank for the number of years to be added under the preceding paragraph. The exact words in which the overriding maximum is prescribed are as follows:—"The allowance awarded to an officer or constable shall in no case exceed two-thirds of his actual pensionable salary." If the word "actual" had been omitted the point would have been a nice one and presented some real difficulty. On the one hand the significance of the use of the word "salary" instead of "annual pay"—the word used in the "existing enactments"—would have to be considered. On the other hand, although the "statutory conditions" are not attracted, yet it would be allowable to elucidate the meaning of Rule 4, as it stands in the Ninth Schedule, by reference to the operation which it is clearly supposed to have in the condition in the preliminary paragraph 2 (*d*), which provides that the retiring officer or constable must, to get any special benefit, show that he is not entitled to retire on the maximum pension for length of service under the "existing enactments" before the expiration of two years from the date of transfer. Presumably the same overriding maximum is in view in both cases. But the express introduction of the word "actual" clearly spoils what might otherwise have been a good fight. Rule 2 (*a*) provides that in calculating the length of service in respect of which the "annual allowance," to be awarded as "compensation," is to be calculated in like manner as a "pension," a certain number of years is to be added to the completed years of "actual" service. "Actual service" is thus contrasted with the notional service on which the calculation is based. Then the "salary" is to be taken at "the amount which it would have reached if he had continued to serve in the same rank for the number of years so added." Thus, again a notional salary is substituted for the actual salary. It is to the latter actual salary, in contradistinction to the notional salary, that Rule 4 refers. Mr. Price contended that it is plain that very exceptional benefits are intended to be conferred by Rule 4, and that if that Rule is to be construed in what I hold is the only way it can be construed there may be no benefit in certain cases. But I am not taken aback by recognising that possibility. It is the appropriate function of an overriding maximum to cut down any excess over reasonable limits. The clear object of the proviso was to make sure that while special

treatment was given where required no one reaped the extraordinary benefit of being able to retire on practically full pay.

As to the application of Rules 2 and 4 in the Ninth Schedule, effect should be given to Rule 2 in the first instance and without regard to Rule 4, and the result so obtained should then be cut down if necessary by reference to the provisions of Rule 4.

The "actual pensionable salary" contrasts with another notional salary—one which was adopted under the "existing enactments" in cases where the salary had been increased owing to promotion that had taken place within the three years preceding retirement. In such cases an average salary for the three years was substituted for the actual salary. The defendants have sought to substitute this notional salary for the actual salary at the date of retirement, and here again the express words of Rule 4 must prevail. In the cases in question—which must be a relatively small number—what I have no doubt was the presumed intention of paragraph 2 (*d*) of the Conditions fails to a limited extent, but the oversight is easy to understand as it relates to a remote consequence. On this point, accordingly, the plaintiffs are entitled to a declaration that "actual pensionable salary" for the purpose of the application of a rule corresponding, for the purpose of Article 10 of the Treaty, to Rule 4 in the Ninth Schedule to the Act of 1920, must be calculated without regard to any average annual amount of pay referred to in any Pensions Enactment or Order.

I have now covered the various questions raised in the Statement of Claim. It must be obvious that after the Transfer of Functions Order, 1922, a certain amount of confusion and misapprehension on both sides existed as to the position and rights of the plaintiffs. An excuse for that is to be found in the complexity of the Enactments and Orders that had to be construed, the unique situation with which several of them dealt, the ambiguous position of the Act of 1920, and the fact that in considering the terms of compensation accorded by the Act of 1920 the question was not one of the direct application of these terms, complicated enough in themselves, but of their indirect application. After seven or eight days' hearing, and after the light brought to the case by the searching analysis of counsel on both sides, it is not surprising that vision becomes clearer.

Solicitors for the plaintiffs: *Roger Greene & Co.*
Solicitor for the defendants: *The State Solicitor.*

G. G. D.

Supreme Court.
1925.
Jan. 20, 21, 22.
March 31.

REV. JAMES O'CALLAGHAN, PLAINTIFF *v.* THE RIGHT REV. CHARLES O'SULLIVAN, BISHOP OF KERRY, DEFENDANT (1).

(1923. No. 443.)

Contract—Construction—Parish Priest removed by Bishop—Contractual relationship—Parties bound by Canon Law of Roman Catholic Church—Evidence — Proof of Canon Law — Foreign Law — Absence of notice—Whether proceedings contrary to natural justice.

Appellant, a Parish Priest, was removed from his parish by a Decree of Removal issued by the respondent, the Bishop of the diocese in which the parish was situated. It was admitted that the legal relationship of the parties was contractual and governed by the "Laws, Ordinances, and Canon Laws" of the Roman Catholic Church. Appellant denied the charges mentioned in the Decree of Removal, and claimed a declaration that the Decree was illegal and void on the grounds:—(1) that there was no power under the Canon Law to issue such a Decree unless a "Citation" had been first served on him, and he had an opportunity to meet the charges made against him; (2) alternatively, if the Canon Law did not require the service of a "Citation" or the granting of a personal hearing, yet the making of the Decree without notice to him was contrary to natural justice.

It was contended for the appellant that the Canon Law of the Roman Catholic Church was not foreign law requiring proof by experts; that the volume of the "Codex Juris Canonici" contained the contract between the parties, constituting a written contract in a foreign language to be construed by the Court accordingly. At the trial a Classical Scholar of Dublin University gave evidence for the appellant as to the translation of portions of the Codex made by him, but he had no special knowledge of Canon Law; and for the respondent two Doctors of Canon Law who were Professors of that subject proved that, according to Canon Law, there was no necessity for the service on the appellant of a "Citation" or process of a similar nature, or for any personal hearing before the making of the Decree of Removal.

Held, that the Canon Law of the Roman Catholic Church is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to proof of foreign law.

The rule is that the foreign law applicable to a case must be taken from the statement of the expert witness as to what the law is, and not from text-books or codes referred to by him. *Sussex Peerage Case,* 11 Cl. & F. 85, *De Bode's Case,* 8 Q.B. 208, and *Nelson* v. *Bridport,* 8 Beav. 527, applied.

The judgment of Lord Langdale M.R. in *Nelson* v. *Bridport,* 8 Beav. 527, having regard to the approval it has received, is to be taken as an exposition of the settled principles upon which the Court will deal with the proof of foreign law. *Concha* v. *Murrietta,* 40 Ch. D. 543, does not depart from the principles laid down by Lord Langdale, as in that case there was a conflict of expert witnesses as to the foreign law applicable.

Held, further, affirming Meredith J., that the Decree of Removal was not illegal on the first ground relied on, because the Court must take the fact of the Canon Law which was applicable to the case as proved by the two expert witnesses called for the respondent, and they proved that the Decree was authorised by the Canon Law. Nor was the Decree illegal on the second ground relied on by the appellant (as being contrary to natural justice), because on the facts and documents, taken in conjunction with the Canon Law procedure proved to be applicable, no case of want of notice had been established.

Shaw v. *Attorney-General,* L.R. 2 P. & D. 156; *Fisher* v. *Keane,* 11 Ch. D. 353; and *Rex* v. *Cambridge University,* 1 Stra. 557, distinguished.

(1) Before KENNEDY C.J., O'CONNOR and FITZGIBBON JJ.

APPEAL from an order of Meredith J. The plaintiff, the Parish Priest of Eyeries, in the County of Cork, brought the action against the defendant, the Bishop of the Diocese in which the said parish is situate, in consequence of a Decree of Removal given by the defendant, and purporting to remove the plaintiff from his office and benefice of Parish Priest of the said parish. The facts are fully stated in the judgment of the Chief Justice.

The plaintiff sought—1, a declaration that the Decree of Removal, dated the 15th November, 1919, and the Confirmation thereof, dated the 6th January, 1920, given by the defendant at the Palace, Killarney, and purporting to remove the plaintiff from his office and benefice of Parish Priest of the Parish of Eyeries, in the County of Cork, was illegal, unauthorised, *ultra vires*, and void; 2, an injunction to restrain the defendant from acting upon the said Decree and directing him to restore the plaintiff to his said office and benefice; 3, an inquiry as to the damage suffered by the plaintiff by reason of the said Decree; and 4, further relief. Meredith J., by his order, dated 29th July, 1924, dismissed the action with costs, and from that order the plaintiff appealed.

Jellett K.C. and *H. Hamilton* (with them *Wood K.C.*), for the appellant:—Appellant at the trial of the action was granted permission to amend his Statement of Claim by inserting an averment that appellant, on becoming Parish Priest, and the respondent, as his Bishop, agreed to be bound by the Laws, Ordinances, and Canon Laws of the Roman Catholic Church regulating their respective offices, and that the matters complained of by the appellant constituted breaches by the respondent of the said Laws, Ordinances, and Canon Laws. Consequently there is no dispute as to the legal principles on which this action was based. Appellant and respondent both contracted themselves under the Canon Law and the procedure which was laid down by that law.

We submit—1, that there was no power or authority under the Canon Law to make or issue the Decree of Removal unless and until a Citation had been issued and served upon the appellant and he had had an opportunity to bring before the tribunal that made the Decree any evidence he thought fit to put forward to rebut the charges made against him. The proceedings complained of, and which resulted in his removal, took place behind his back: he had had no notice of the charges mentioned in the Decree or of the time or place fixed for the trial, and, as a result, did not attend the trial, and was condemned without being heard. Furthermore, no notice of any hearing for the purpose of confirming, or otherwise dealing with the Decree, was served upon him. The removal was a judicial removal. The Canons of the Church specifically or implicitly required Citation, and the absence of a Citation was in direct violation of them: see Canons 1712, 1715, 1723, and 1724 of

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the New Code of Canon Law of the Roman Catholic Church. 2, In any event, if the Canon Law does not require a citation, the making of the Decree of Removal without prior notice and without an opportunity having been given to the appellant to meet the charges made against him, was not consonant with natural justice: *Shaw* v. *Attorney - General* (1); *Fisher* v. *Keane* (2); *King* v. *Cambridge University* (3).

The evidence of two expert witnesses offered for the defence, and to which objection was taken on behalf of the appellant, was admitted at the trial of the action to prove and interpret those Canons of the Codex which were said to be applicable. No doubt the Court requires foreign law to be proved in each case, and a witness is not accepted unless he possesses special knowledge of the subject in question. We are not dealing here with what is called foreign law as interpreted by experts. The Canon Law of the Roman Catholic Church is not foreign law within the rule. The Codex Juris Canonici is a written contract between the parties to the action and is to be construed by the Court upon its own reading and interpreted by the rules laid down in *Di Sora* v. *Phillipps* (4); see also *O'Keeffe* v. *Cullen* (5). Furthermore, it is not the law of any particular State; it is in operation here and in many other countries, and is co-extensive with the Roman Catholic Church. Judges have construed the Decree of the Council of Trent and the Decree Ne Temere without expert assistance: *Ussher* v. *Ussher* (6). The *Sussex Peerage Case* (7) is not in point, as the issue was a question of doctrine and not the interpretation of a contract. In *Brailey* v. *Rhodesia Consolidated, Limited* (8) Roman-Dutch Law applied and expert evidence was called and received as to what that law was. As to the meaning of the term "foreign law" and its mode of proof, see Halsbury's Laws of England, vol. 13, pp. 487–489. A case of this description could not proceed on the analogy of foreign law, because the Court was not dealing with foreign law. The parties were equally bound by the provisions of the Canons of their Church whether they lived in Ireland, France, America, or elsewhere.

There had been an appeal by the appellant to the Holy See. He went to Rome, but could get no advocate to put forward his claim. Consequently no appearance was made on his behalf before any tribunal, and a decision was given against him behind closed doors.

S. L. Brown K.C. and *T. S. M'Cann K.C.* (with them *B. Roche*), for the respondent:—Both parties to this action contracted themselves under the Canon Law of the Roman Catholic Church and the procedure which was laid down by that law. And the respondent contends that the appellant was

(1) L. R. 2 P. & D. 156.
(2) 11 Ch. D. 353.
(3) 1 Strange, 557.
(4) 10 H. L. C. 624.
(5) I. R. 7 C. L. 319.
(6) [1912] 2 I. R. 445.
(7) 11 Cl. & F. 85.
(8) [1910] 2 Ch. 95.

removed from his parish in accordance with the Canons applicable to the case, and that the Decree of Removal and the Confirmation of that Decree were made in the form and by the procedure prescribed by them. It is necessary for the respondent to satisfy the Court that the Canons warranted what had been done and that the prescribed procedure had been accurately followed. It is admitted that the Canons applicable to this case are contained in the Codex. The interpretation of the Canons is a question of science, as law is a science. All questions of science or art are questions of fact and expert evidence is always admissible on every question of science and art: Stephen's Digest of the Law of Evidence, Article 49; Taylor on Evidence, Vol. II (11th edit.), sect. 1423, p. 973. The contract was that the appellant and respondent were to be bound by this particular code of law which is foreign to these Courts. We must see what that law is, and in order to do so at the trial of the action we placed before the Court the testimony of two expert witnesses, according to the rule already quoted in Article 49 of Stephen's Digest. The evidence was that of two Doctors of Canon Law who deposed that under the Canon Law of the Roman Catholic Church there were two modes of removal:—1, judicial, and 2, administrative. The former could only follow the commission of a grave crime and required the service of a Citation on the priest. The latter might take place for any cause which rendered the ministry of the priest harmful or uselsss in his parish, and did not require the service of a Citation on him as a necessary step in the procedure leading to removal. These two expert witnesses gave it as their opinion, having read the various documents put in at the trial, that the removal of the appellant from his parish by the Decree, dated the 15th of November, 1919, and purporting to have been made in pursuance of Canons 2147–2156 on the grounds of "odium plebis" and "mala rerum temporalium administratio," was in accordance with those Canons. No evidence has been given by the appellant to correct or contradict this evidence, and with this evidence uncontradicted, together with the documentary evidence put in at the trial, we submit that not only was everything done in accordance with the canons applicable to the case, but it was done meticulously and with the utmost precision.

It was suggested that when appellant went to Rome he had no one to put forward his case for him, and that all proceedings were held behind closed doors. It was for appellant himself to put forward his case personally in his own way. He was not entitled to the services of an advocate.

Cur. adv. vult.

March 31.

KENNEDY C.J.:—

This is an appeal against the judgment and order of the High Court of Justice (Mr. Justice Meredith) dismissing the

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action out of Court with costs. The claim of the plaintiff in the action was for a declaration that a certain Decree of Removal, dated the 15th November, 1919, and the confirmation thereof, dated 6th January, 1920, given by the defendant at the Palace, Killarney, and purporting to remove the plaintiff from his office and benefice of Parish Priest of the Parish of Eyeries (Kilcatherine) in the County of Cork, was "illegal, unauthorised, ultra vires and void"; and also for an injunction to restrain the defendant from acting upon the said Decree, and directing him to restore the plaintiff to his said office and benefice; and for an enquiry as to the damages suffered by the plaintiff by reason of the said Decree; and the usual further relief.

The plaintiff is a priest of the Roman Catholic Church, having been ordained as such in the year 1870. After holding certain curacies, he was appointed Parish Priest of Eyeries in the County of Cork in the year 1904. The defendant is the Bishop of the diocese in which the said parish is situate.

The plaintiff and the defendant are upon common ground in that they admit that they are respectively subject to and bound by "the Laws, Ordinances and Canon Laws" of the Roman Catholic Church, regulating their sacred offices and their relations with one another.

The Decree of Removal of which the plaintiff complains and which was received by him in the month of November, 1919, ran as follows:—

DECREE OF REMOVAL.

The Palace, Killarney.

To the Rev. James O'Callaghan,
Parish Priest of the Parish of Eyeries
(Kilcatherine), Co. Cork.

Your people's hatred of you, and your ill administration of the temporal goods of your parish, even if they had not already been matters of notoriety throughout our Diocese, have been proved conclusively by admissions made by you, both in your letters and in the evidence you gave at the trial in which your Curates, Fathers Dennehy and O'Reilly, rightly claimed against you for the cost of the maintenance which they ought to have had in your parochial house, but which, in violation of Diocesan custom and law, you forced them to seek outside.

This regrettable state of things makes it incumbent on us to take remedial action in discharge of our obligation to provide for the good of souls.

On the 11th day of July of the present year, 1919, we discussed your case with Synodal Examiners duly appointed for the purpose: the Very Rev. David O'Leary, P.P., V.G., Dean of Kerry, and the Venerable Archdeacon Marshall, P.P., V.G., Kenmare, and, with their consent and approval, decided to address to you an invitation to resign your parish of Eyeries, Co. Cork. Our invitation duly reached you, but you did not accept the invitation, and again on the 8th of September, 1919, we discussed your case with the same Synodal Examiners, in the light of the reply we received from you, and it was unanimously decided that a Decree of Removal should issue against you.

In accordance, therefore, with the prescriptions of Canons 2147 to 2156 of the new Code of Canon Law, and in virtue of the powers therein conferred, we hereby remove you from the office and benefice of Parish Priest of the Parish of Eyeries (Kilcatherine), Co. Cork.

Given at our Palace at Killarney, the fifteenth day of November, in the year of our Lord 1919.

(Signed) ✠ CHARLES O'SULLIVAN,
Bishop of the Diocese of Ardfert and Aghadoe.

JOHN BREEN,
Chancellor.

(Seal)

Carolus Dei et
Apostolicae Sedis
Gratia Episcopus
Kerriensis.

The confirmation of that Decree, received by the plaintiff in the month of January, 1920, of which he also complains in this action, reads as follows:—

CONFIRMATION OF THE DECREE OF REMOVAL.

To the Rev. James O'Callaghan,
Parish Priest of Eyeries (Kilcatherine), Co. Cork.

The letter which you sent in reply to the Decree of Removal was duly laid before Parish Priest Consultors, specially summoned to consider your case, namely, Very Rev. Patrick Canon Hayes, P.P., V.F., Castletownbere, and Very Rev. Patrick Canon Browne, P.P., V.F., Cahirciveen. When your letter and all the steps of the process for your removal up to the time of the meeting had been fully considered, the votes were taken and it was decided that the Decree of Removal should be confirmed and enforced.

Consequently, by powers granted by the Canons of the new Code already mentioned in the Decree of Removal, I confirm said Decree of Removal, and hereby deprive you of the office and benefice of Parish Priest of Eyeries (Kilcatherine), Co. Cork.

AND I command you immediately, or as soon as possible, to vacate the parochial residence and to hand over to the administrator whom I have appointed, all property belonging to the parish.

Given at our Palace in Killarney, the sixth day of January, in the year of our Lord 1920.

(Seal) ✠ CHARLES O'SULLIVAN,
Bishop of Kerry and Aghadoe.

JOHN BREEN,
Chancellor.

The plaintiff by his Statement of Claim, having first denied the truth of the charges mentioned in the Decree of Removal, contended and submitted that there was no power or authority under the Canon Law to make or issue any such Decree, unless and until a Citation had been issued and duly served upon the party affected by such Decree, and he pleaded textually certain passages or extracts in the Latin language averred to be respectively Canons 1712, 1715, 1723, and 1724 "of the Canons of the said Church." He alleged that no Citation was served upon him "as provided by the said Canons," and that he had

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no notice of the charges mentioned in the Decree, or "of the time and place fixed for the trial of such charges," and no opportunity of attending or giving evidence to rebut the said charges, and that he "did not, in fact, attend the said trial." He further alleged that no notice of any hearing for the purpose of confirming or otherwise dealing with the said Decree was served upon him. He accordingly contended and submitted, in the first place, that the said Decree was not made in accordance with the Canon Law of the Roman Catholic Church, but, on the contrary, in direct violation of the same, and was accordingly *ultra vires,* void, and illegal. In the second place, he said that the making of the said Decree of Removal, as he alleged, without prior notice to him by Citation or otherwise, and without an opportunity to meet the charges therein, was contrary to natural justice, and that the Decree was accordingly illegal and void.

He complained that in consequence of the Decree he had been compelled to leave the said parish, to relinquish his position as Parish Priest with the rights and emoluments appertaining thereto, and to accept in lieu thereof a pension of £80 per annum.

The defendant by his defence traversed the alleged facts constituting the plaintiff's grievances, and, in particular, the plaintiff's allegations as to want of notice of the charges stated in the Decree and opportunity to rebut them. He averred that the said Decree was "duly made in accordance with the prescriptions of Canons 2147 to 2156 inclusive therein referred to, being the Canons applicable to the case." He further said that the said confirmation of the Decree was duly made in all respects in accordance with the said Canon Law. A further defence, relying upon the plaintiff having sought a Recursus to the Holy See, and failed therein, was not pursued.

By a curious omission—curious because the principle was so notably established in a remarkable case bearing some resemblance to the present—the consensual nature of the obligation of the Canon Law for the purposes of civil litigation did not appear by the pleadings. At the trial, however, the Judge, by order, allowed the plaintiff to amend his Statement of Claim by inserting an averment that "the plaintiff on becoming Parish Priest and the defendant as such Bishop agreed to be, and were, bound by the Laws, Ordinances, and Canon Laws of the Roman Catholic Church regulating their said respective offices, and that the matters complained of by the plaintiff constituted breaches by the defendant of the said Laws, Ordinances, and Canon Laws and of the terms of the said agreement of and with the plaintiff." The defendant was allowed to amend his defence by pleading traverses of the breaches so alleged. Until these amendments were made, the action as it stood on the pleadings was, as Mr. Justice Meredith pointed out, really in the nature of a direct appeal from the domestic forum of the Church to the civil Court of Justice, which has no such appellate jurisdiction.

Having shown how the case stood upon the pleadings at the trial, I shall now state as shortly as possible the relevant facts and documents proved in evidence. The only witnesses examined for the plaintiff were the plaintiff himself and a Classical Scholar of Trinity College, who verified certain translations made by him. The only evidence offered by the defendant was the expert evidence of two Canonists. The facts, therefore, depend on the oral evidence of the plaintiff and the documents proved, or admitted by him.

At the beginning of the year 1919 troubles which had been brewing for some time in the parish of Eyeries came to a head. The plaintiff had a parochial house which had been acquired with the assistance of a loan from the Board of Works, and the provision of money to pay the annuity for discharge of the loan was in contention between the plaintiff and his people. The curate of the parish claimed a right of maintenance and lodging in the parochial house, which was denied by the plaintiff, who finally put the curate out of the house. Nor were these isolated ripples on the parochial waters. On the 21st March, 1919, the defendant addressed the following admonition to the plaintiff:—

The Palace, Killarney.

To the Rev. James O'Callaghan, P.P.,
Eyeries (Kilcatherine), Diocese of Kerry.

For your own sake and the good of religion, we find it necessary as your Bishop, in a paternal manner, to admonish you to admit back into the Presbytery the Curate of the Parish, the Rev. Gerald Dennehy.

We also wish to call your attention to your obligation of refraining from speaking on political matters and other forbidden subjects from the Altar or within the Church.

We hope this first formal admonition will be effective.

Dated this 21st day of March, 1919.

✠ CHARLES O'SULLIVAN,
Bishop of Kerry and Aghadoe.

(Seal.)

To which the plaintiff replied as follows:—

Eyeries, Co. Cork,
24th March, 1919.

MY LORD,

I regret the painful necessity of giving your Lordship notice that I will not plead to the charge brought against me by Father Dennehy until I will have heard whether you have, or have not, authorised Father Dennehy to keep my Baptism Dues and the Baptism Records. Your answer to this notice will determine the course I will adopt in dealing with your Lordship and Father Dennehy.

Re political speeches, open and covert, from the H. Altar, I beg to inform your Lordship that never in all my life have I made political speeches openly, or in disguise of sermons, from the Altar, and never from any platform attacked any man by name, or by a description of his person or occupation. You have no reason to thank the unworthy men who mislead you to issue against me your censure *ab homine*.

(Signed) J. J. O'CALLAGHAN.

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On the 5th April, 1919, the Bishop sent a second admonition to the plaintiff, which referred only to the first matter mentioned in the previous letter, and was silent as to the matter of speaking on politics within the church.

The plaintiff replied to the second admonition by a letter, which he referred to in the course of his evidence as setting out his demand for a full investigation into his case, and as such I will read it:—

8th April, 1919.

My Lord,

In reply to your Lordship's letter of April 5th, 1919, I beg to reply:—

My Lord, give me the terms on which I consented to take Eyeries and the house cess, residence of curates here, etc., are settled as far as I am concerned. By my contract with Dr. Mangan I was not only safeguarded against house cess, but entitled to a better parish than Eyeries. Dr. Mangan broke his contract and disregarded the weighty reasons I urged for a speedy removal from this place. These reasons hold yet, are aggravated, are known to your Lordship and ignored by you plainly. You want to commit me to a life-long conflict over money with a people exceedingly mean, my atrocious and persistent slanderers. I will welcome an enquiry into my case *versus* my Bishop, and my Bishop *versus* your humble servant. I will not plead to the charge you bring against me. It does not take in the whole case. You find fault with my theology, and advise me to read books Transit. I brought charges against Father Dennehy which, if true, made it obligatory on you to remove him immediately. If he has kept my Baptism Fees and records without your authority, it was your Lordship's duty to investigate the case, and, if found true, to remove him. If he has your authority to keep my Fees and records, set up day after day his Altar against mine, when I am saying Station Mass, contradicting Sunday after Sunday from the Altar the statements I had to make in defence of my rights and authority as Parish Priest, disregarding parochial regulations in force here for fourteen years, never complained of, approved by Dr. Mangan, rivalling me openly and trying to supersede me day after day, then, my Lord, you are not the man to act as Judge in Dennehy *versus* O'Callaghan, *re* house, *re* removal of Father Dennehy. He abused me in scandalous language in presence of witnesses. He threatened to beat me. This is known to you. You did not remove Father Dennehy.

I will not allow Father Dennehy into my house any more, in so far as my opposition can invalidate or make illicit his priestly functions here, my opposition stands.

I beg to remain, my Lord,

Your Lordship's humble servant,

James O'Callaghan, P.P.

Most Rev. Dr. Charles O'Sullivan.

It appeared at one time that the terms of some special agreement between the plaintiff and the Most Reverend Dr. Mangan, the defendant's predecessor in office, affecting the plaintiff's appointment as Parish Priest, were to be relied on by the plaintiff, but Mr. Jellett infomed us at an early stage of his argument that any question as to any such special agreement is out of the case and that nothing arises upon the suggestions made in that connection by the plaintiff when giving evidence.

On the 9th July, 1919, the plaintiff was served with a formal document or process called a "Citation," which reads as follows:—

Killarney, 9th July, 1919.

To Rev. James O'Callaghan,
Parish Priest, Eyeries.

I hereby give you a Citation and command you to appear before me and two of the Synodal Judges at one o'clock on Friday, the 11th July, 1919, at the Palace, Killarney, in the matter of the demand made on you, Rev. James O'Callaghan, Parish Priest of Eyeries, for £59 4s. 6½d., the cost of lodging and maintenance, fire and light, from January 13th, 1919, to May 16th, 1919, of Rev. Gerald Dennehy, who during that time acted as your Curate.

DAVID O'LEARY,
Officialis Curiae.

Johannes Breen, Notarius.

Father O'Callaghan wrote asking for time to consult his lawyer, but was informed that the case must proceed according to the terms of the Citation.

The Court was held on the 11th July, 1919, pursuant to the Citation. The members of the Court were the Rev. David O'Leary, P.P., V.F., Dean of Kerry, Officialis, Venerable Archdeacon Casey, P.P., Castleisland, and Very Rev. Patrick Canon Browne, Synodal Judges, and it was attended by the Rev. John Breen, Chancellor. A full official minute of the proceedings has been put in evidence by the plaintiff and made part of his case here. It appears by this minute that the proceedings were confined to money claims against Father O'Callaghan by two successive curates, Father O'Reilly and Father Dennehy, in respect of maintenance, lodging, fire and light. Father O'Callaghan attended the Court and delivered a protest which is entered on the minutes as follows:—

I HEREBY PROTEST with all the vehemence I can against such haste in bringing this trial on that you will not allow me to consult my lawyer.

I regard your haste as a device to rescue Most Rev. Charles O'Sullivan, Bishop of Kerry, from the consequences of the gross neglect of duty and gross injustice in dealing with me as a Parish Priest of his diocese.

I regard the claims of Father Dennehy and Father O'Reilly, as curates active in co-operation with me, as farcical. Both, especially Father Dennehy, used their best energies to deprive me of all authority as Parish Priest, to deprive me of my living by depriving me of my right to perform in person duties I was bound as Parish Priest to perform in person and so secure contingent emoluments, to spread contempt and foment hatred against me in every part of the parish, to foster the hope that rebellion against me would drive me out of the parish and that the vacancy thus made might be filled by Father Dennehy.

I regard your haste as a device to baffle the steps my lawyer is taking to protect my person, my honour, my interest, my character, and to screen from justice one who was a co-operator with his curates by his neglect to stop his curates from their vile and unjust attempts to ruin me by their collaboration with a people exceedingly mean in money matters, my atrocious and persistent slanderers, whose hatred of me is well known to

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those curates to have gone so far as that young men and women threatened to burn their parents' homes should they pay me dues or speak a word in my favour.

I warn you that should you go on and find a verdict against me, I will hold you as conspiring with my enemies to beggar me by driving me out of the parish.

The hearing proceeded and oral evidence was given by the two curates and also by Father O'Callaghan. Upon the conclusion of the hearing a Decree was pronounced against Father O'Callaghan, and drawn up formally in the following terms:—

I hereby decree, with the assent of my two assessors who are Synodal Judges, namely, the Venerable Archdeacon Casey, Vicar Forane and Parish Priest of Castleisland, and the Very Rev. Patrick Canon Browne, Vicar Forane and Parish Priest of Cahirciveen, that the Rev. James O'Callaghan, Parish Priest of Eyeries, is bound to pay to the Rev. Robert O'Reilly the sum of £45, expenses incurred by him for board and lodging, fire and light, while acting as Curate of Eyeries, and to the Rev. Gerald Dennehy, the sum of £59 4s. 5½d., expenses incurred also by him for board and lodging, fire and light, while acting as Curate of Eyeries.

DAVID O'LEARY, Officialis Curiae.
JOHN ARCHDEACON CASEY, P.P., V.F.
PATRICK CANON BROWNE, P.P., V.F.
JOHN BREEN, Chancellor.

11th July, 1919.

A letter was on the same day sent to the plaintiff by registered post, demanding payment of the said sums.

So ends that particular case so far as we are concerned. Those proceedings are not in any way questioned or challenged in the present action or on this appeal, but they have been presented fully on behalf of the plaintiff, both here and in the Court below, for the purpose of explaining what follows, and perhaps not without some notion of giving what is called "an atmosphere" to the matters with which we are directly concerned. I have stated these proceedings in some detail, not only because of the light they throw on the subsequent facts, but also because they have an illustrative value for the better understanding of the questions of Canon Law which have been raised.

The next chapter of the story opens with the following letter from the defendant to the plaintiff, written on the day of the hearing of the Curates' claims:—

The Palace, Killarney,
July 11th, 1919.

To the Rev. James O'Callaghan,
Parish Priest of Eyeries, Co. Cork.

I invite you to resign your parish of Eyeries. I do so for two reasons:—

(1) The hatred or deep-rooted dislike which your people, or a considerable number of them, have conceived towards you, and which cannot but render your ministry in the parish useless, if not harmful.

(2) Your maladministration of the temporalities of your parish.

The first reason is proved valid from repeated admissions in your own letters, as well as from your admissions at the trial here to-day, when, amongst other things, you described your people as exceedingly mean in money matters—"My atrocious and persistent slanderers, whose hatred of me is well known to those curates to have gone so far that young men and

women threatened to burn their parents' homes should they pay me dues or speak a word in my favour.''

The second is proved from your failure (*a*) to collect your house cess and your declaration that you would pay the cess no longer; (*b*) to make the seminary collection last year, 1918 (see Canon 1356 of the new Code) (Tributo pro Seminario obnoxia sunt, quavis appellatione remota, reprobata qualibet contraria consuetudine et abrogato quolibet contrario privilegio, ... omnia beneficia . . . . paroeciae aut quasi-paroeciae, quamvis alios reditus, praeter fidelium oblationes, non habeant); (*c*) to pay your Fire Insurance premium which I myself was forced to pay.

As required by Canon Law I have this day called in two of the Synodal Examiners and discussed the matter with them, and they are of opinion that I ought to invite you to resign your parish.

I invite you, therefore, to resign your parish within ten days from the date of this letter.

✠ CHARLES O'SULLIVAN,
Bishop of Kerry and Aghadoe.

John Breen,
Chancellor of the Diocese.

The plaintiff on the 15th July replied as follows:—

Eyeries, Co. Cork,
July 15th, 1919.

MY LORD,

I hereby appeal against the verdict delivered against me on the 11th by the Judges you appointed to decide the case, O'Reilly and Dennehy *v.* O'Callaghan, on the grounds specified in my protest which were taken down by the Notary, Rev. John Breen, and delivered to your Lordship. I also appeal on the ground that those curates did not give me the obedience and reverence mentioned as due to me by the statutes of the diocese, by the statutes of our provincial synods, the statutes of the national synods of Maynooth. I protest against your invitation to me to retire from my parish in ten days. You did not enquire to find out whether the meanness of this people in money matters, these atrocious and persistent slanderers and the hostility to me of young people was my fault or theirs, if theirs, I am entitled to promotion to a better parish and not to be condemned to deposition from my parish. I know the promoters of this rebellion against me and their object. I will call your Lordship and your accomplices to a strict account. Deposition is not specified in the Codex as a punishment for not having paid the seminary contribution. You did not ask me why I did not send it. I could tell you that I had to draw that year from my deposits £100 for my support. I gave you the reasons why I did not pay the fire cess, and took it for granted that they satisfied your Lordship as you did not reply.

I beg to remain,
Respectfully,
JAMES O'CALLAGHAN, P.P.

Most Rev. Dr. Charles O'Sullivan.

It next appears that on the 8th September following, the defendant met his two Synodal Examiners in conference on the matter. This appears by recital in the subsequent Decree and also by a copy of the official minutes of the Conference which has been put in and read by the plaintiff's counsel. The minute is as follows:—

Minutes of Meeting held on the 8th of September, 1919.

At 12.30 p.m. on the 8th September, 1919, in the Sacristy of the Catholic Church of Kenmare, the Bishop of Kerry, Most Rev. Charles O'Sullivan, D.D., and the Synodal Examiners already mentioned, namely,

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the Very Rev. David O'Leary, D.D., Dean of Kerry, and the Venerable Archdeacon Marshall, P.P., V.G., met to consider the reply of Rev. James O'Callaghan, P.P., to the invitation to resign his parish of Eyeries.

The oath having been taken and the matter having been duly considered, the question was put—Ought a Decree of Removal issue against the Rev. James O'Callaghan, Parish Priest of Eyeries? All three voters' votes were cast in the affirmative.

✠ CHARLES O'SULLIVAN.
DAVID O'LEARY, P.P., V.G.
PATRICK MARSHALL, P.P., V.G.

John Breen, Notary.

The plaintiff was not present at that meeting. He says that he did not receive any notice, citation or summons to attend any such meeting, and that he learned of it for the first time when he received the Decree of Removal, which was sent him by registered post on the 15th November, 1919.

I have already read the Decree of Removal. I will now read the very important letter from the defendant to the plaintiff which accompanied the Decree.

The Palace, Killarney,
15th November, 1919.

DEAR FATHER O'CALLAGHAN,

With regard to the Decree enclosed herewith I wish to point out to you that if you have any new facts or arguments regarding the subject-matter of it, they will be duly considered with the former statements by the ordinary and two Parish Priests Consultors *if* sent on to me within ten days.

Meantime the Decree will not affect your faculties.

Believe me,
Yours faithfully,
✠ CHARLES O'SULLIVAN,
Bishop of Ardfert and Aghadoe.

Father O'Callaghan's reply was a long letter of the 19th November, 1919, in which he writes:—

MY LORD,

Re "Hatred of me." It arose from the organisation through the parish against the house cess. I made you aware several times of the existence of this organisation to resist it. I went to Killarney and had an interview with you, you said the parish was bound to provide a house for its priests. You said this and did nothing. This was before the mad fit that took the people here on the 21st October when they met at Gorth and bound themselves one to another to resist the cess and spread opposition to me by letters and otherwise. All the parish, young and old, were mad Sinn Féin, the inner circle of a dangerous secret society made them madder by circulation from ear to ear that I brought soldiers and police here to shoot any man who attempted to evade conscription. My house was marked for destruction by bombs in Charlie Hurley's map. I saw something in the behaviour of the people I could not understand. I gave no provocation. I made no speeches. My Curate got the work I was bound to perform. He knew he was violating my rights. He went on profiteering at my expense. Dying Christians could not have the priest they wanted in their last moments. Children threatened to burn their parents' houses should they pay me dues or speak a word in my favour. Your Decree shows that you know all this. You should have investigated the case and put the whole parish under interdict — all were guilty — as

Dr. Coffey did the Parish of Firees for far less annoyance (to the Curtain family in church) than I had to endure several times in the House of God in all but the most holy time of the sacred celebration. A few days after Christmas I heard the cause of the estrangement. I lost no time. I gave them a fright they have not forgotten yet, with the result that I have more intentions since than I can discharge. I get calls. I get baptisms. I attend funerals. I have baffled the cunning efforts of Rev. G. Dennehy to make a case for my deposition on the grounds that the people will not have my ministrations.

There follow a number of charges against the Curate to which I need not give further circulation. The letter continues:—

Young men and young women, all Sinn Féin, all have faith and respect for my ministrations, at stations they crowd around me, the same at my confessional. I will bring against your Decree not the doped evidence of one witness, I will bring the whole parish. Pocket your Decree or better burn it; you and your consultors have disgraced yourselves by issuing it. *Re* Maladministration — It was your business when you had sufficient evidence to prove that I had appropriated, wasted and neglected to protect temporalities, to make me pay. If evidence failed to convict me, you would have saved me from the calumny of the Diocese. Your consultors do not advise the insertion of maladministration in the Decree without having before them the records of the Court where they could find an entry of my conviction, they should be able to say that "the maladministration" was so great that the welfare of the parish demanded my deposition. *Re* Appeal—I would long since have brought you before Rome, were it possible to find in Ireland a lawyer qualified to bring my case against you before Rome. It is the fault of the Irish Hierarchy that I could not. It is well known that Irish Parish Priests holding political views, not those of their Bishops, had to suffer in silence, there was no road from Ireland to Rome. Irish Bishops were too wise to provide men who would know the way to Rome and bring to justice cunning and unscrupulous despots.

Under the Codex I claim the suspension of your Decree until it will be possible for me to find an advocate.

Re Old age — My letters will show you whether my mind is going or gone—of that you are judge. *Re* Physical debility—I am not a rusted old pan to be thrown over a fence, there is vigour in every inch of me, far more than there is in many of the young men who make money, fancy groceries, rest plans for deposing old priests, the circuit of their priestly careers. Serjeant Sullivan told them their motive for joining in with Sinn Féin, not one of them answered back.

I beg to remain,

My Lord,

Your obedient servant,

JAMES O'CALLAGHAN, P.P.

Most Rev. Dr. Charles O'Sullivan,
The Palace, Killarney.

It appears that the defendant, on the 16th December, 1919, met two consultors in conference to consider the foregoing reply of the plaintiff. The official minutes of the meeting have been read and put in on behalf of the plaintiff. The minutes are as follows:—

Minutes of Meeting held on the 16th December, 1919.

On the 16th December, 1919, at one o'clock p.m., the Very Rev. Denis Canon O'Riordan, P.P., Boherbue, having declared it to be impossible for

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him to be present, the Very Rev. Patrick Canon Hayes, P.P., V.F., Castletownbere, and the Very Rev. Patrick Canon Browne, P.P., V.F., Cahirciveen, Senior Parish Priest Consultors, met at the Bishop's Palace, Killarney, and, having taken the oath, considered the letter of the Rev. James O'Callaghan, P.P., Eyeries, in reply to the Decree of Removal, and the allegations contained in said letter as well as the allegations and depositions made and considered in previous discussions of his case, and decided that the Decree of Removal must be confirmed.

The question was put—Ought the Decree of Removal be confirmed? All three votes were cast in the affirmative.

The question of the pension to be awarded Father O'Callaghan was considered.

✠ Charles O'Sullivan.
Patrick Canon Hayes, P.P., V.F.
Patrick Canon Browne, P.P., V.F.

John Breen, Notary.

Father O'Callaghan was not present at that meeting. He was not summoned to it, nor did he know of its taking place till he received the Confirmation of the Decree of Removal.

I have already read the Decree of the 6th January, 1920, confirming the Decree of Removal of the 15th November, 1919. It was sent to the plaintiff accompanied by the following letter of the same date from the defendant:—

The Palace, Killarney,
6th January, 1920.

Dear Father O'Callaghan,

In connection with the Decree of Removal which is enclosed herewith, I have taken advice with the two Examiners and two Parish Priests Consultors and we decide that you get a pension of £80 (Eighty Pounds) per annum.

You are indebted to Fathers O'Reilly and Dennehy for the cost of maintenance from the date you forced them to leave the Presbytery to the present. Those moneys must be paid. I have to warn you that all your faculties as Parish Priest cease directly you receive this Decree, and under no pretext whatever are they to be exercised. Should you, for example, hear a single confession, you incur *Suspensio ipso facto a Divinis.*

All parish property, house registers, etc., are to be handed over to the care of the Rev. Michael Daly, whom I have appointed to administer the parish.

I am,
Yours faithfully,
✠ Charles O'Sullivan,
Bishop of Kerry and Aghadoe.

The Rev. James O'Callaghan,
Eyeries.

A further letter was written by the Bishop calling upon the plaintiff to hand over the Presbytery to the Administrator appointed by the Bishop, but the plaintiff wrote refusing to comply with this command.

The plaintiff took an appeal to Rome in July, 1921. It does not appear what became of that appeal, but I gather that it was not successful. The plaintiff was apparently asked about it on his direct examination only for the purpose of getting in a letter written by the defendant to a distinguished Irish Ecclesiastic

in Rome, telling him of the case so that he might keep the Bishop informed as to the appeal coming on for hearing before the tribunal there. The letter was disclosed by the Bishop in his affidavit of discovery. It sets out some of the story of this case for the information of the person to whom it is written, and the plaintiff's counsel rely on the fact that it says nothing about *odium plebis*. They do not seem to realise that they, having put in this letter (otherwise inadmissible), would be bound by what it contains as well as its omissions, and that it is far from helpful to their case on the facts. It does seem to me, however, that a private letter of this kind, read in the light of the circumstances in which it was written, contributes nothing of value to the case, one way or the other, and I do not propose to refer to it again.

In his cross-examination, the plaintiff, when asked as to his failure to pay the insurance premium for the parochial house, said: "I could not pay the insurance when the whole parish were in arms to starve me out of the parish and I could not get money in." As regards the annuity on the parochial house, his evidence was that he made an effort to get the people to pay it, but that they refused because they regarded it as an exaction.

At the close of the plaintiff's evidence, the case stood in this way—the correspondence, decrees, and other documents had been proved, and such facts as were necessary to link together the documents (which told practically the whole story) had been proved. But the plaintiff brought this action relying on "the Laws, Ordinances, and Canon Laws of the Roman Catholic Church," by which, according to his pleadings, both he and the defendant were bound, and which, according to his pleadings, had been violated by the defendant by the two Decrees and the acts and omissions complained of in the Statement of Claim. Yet the plaintiff did not prove a single Law, Ordinance, or Canon Law of the Church, nor attempt to show how any of the matters he did prove constituted any breach or violation thereof. The whole of his evidence was conducted in a way which, in my opinion, fully justified Mr. Justice Meredith in his observation that what the plaintiff and his counsel were really at, was a direct appeal from the ecclesiastical jurisdiction to the High Court of Justice.

One other witness only was examined for the plaintiff. He was a classical scholar of Trinity College, but admitted that he was not versed in deciphering ecclesiastical law. He was asked: "Did you make the translation of these texts?" to which he answered, "Yes." What texts? The Judge's note does not show that any "texts" of any kind (other than the documents in English which I have already mentioned) were proved or put in evidence. Three or four individual Latin words were then put to him in a kind of dictionary test to which he applied his classical scholarship with every propriety.

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He was not taken through the translations of whatever texts he confessed to having made, and, I may add, his translations were not open to us. Neither the plaintiff nor this witness stated that he had ever studied, or even read a line of Canon Law, or of any book on the subject, or had any acquaintance whatever with it.

At the close of the plaintiff's case, what was the position? Nothing more or less than that the facts of a parish scandal had been exploited and stood there on the records of the Court. The Judge had tried to clear the confusion and get the issues properly knit for determination by causing the necessary amendments to be made in the pleadings as I have already mentioned. Yet that lead was not followed up.

Now, though the plaintiff did by his Statement of Claim, and properly, traverse the charges mentioned in the Decree of Removal which he avers "were untrue and had no foundation in fact," and though we have had the whole unhappy story gone into both here and in the Court below, and though we have heard much debate on the subject of those charges which it has been sought to show were neither well-founded nor honestly made, or real charges (note for instance the use sought to be made of the defendant's letter to his friend in Rome), when we come to determine the real issues open and before the Court at the trial and the net questions which we have to decide, we find that the Court was never concerned with any issue of fact in relation to these charges. The only question in the case from first to last is, and always was, this:—The plaintiff as Parish Priest of Eyeries and the defendant as his Bishop, being by virtue of agreement, and admittedly, bound in their relations one to the other by the Laws, Ordinances, and Canon Laws of the Roman Catholic Church, was it competent for the defendant, acting under the authority of the said Laws, Ordinances, and Canon Laws, to issue a Decree removing the plaintiff from the office and benefice of Parish Priest of the said parish without first issuing to the plaintiff a formal process in the nature of a summons or "citation" calling him before an ecclesiastical tribunal to meet and answer (if he could) the matters alleged to constitute the particular grounds (admittedly canonical grounds in the present case) upon which the issue of such Decree was based? This statement of the question for decision in the action cannot be objected to by the plaintiff, for I find on reading the order for discovery made on the 2nd April, 1924, the following recital:—"the plaintiff by his counsel stating that the only issue intended to be raised by the Statement of Claim in this action is whether the plaintiff was duly cited to appear before the defendant before the pronouncement of the Decree alleged in the Statement of Claim." It is common case that he was not in fact cited at all, in the sense that the process of Canon Law procedure known as "citatio" was not in fact issued to him. Accordingly,

interpreting the word "duly" by the Statement of Claim, the issue stands net—whether according to the Laws, Ordinances, and Canon Laws of the Catholic Church the issue of such a "citatio" was necessary for validity of the Decree of Removal complained of in the Statement of Claim. In my opinion, on the evidence as it stood at the close of the plaintiff's case, the Court was not in possession of the materials necessary for the decision of the one and only issue for decision.

The evidence of two witnesses only was offered for the defence, each of them a Doctor of Canon Law and Professor of that subject. Their evidence was tendered as "expert evidence." The evidence of both was objected to save in so far as it consisted of verifying translations. The evidence was received (the objection being noted), but it has been argued here that the evidence was inadmissible, and that we must not look at it, on the ground that the Canon Law of the Roman Catholic Church is not a matter which may be the subject of expert evidence, at any rate beyond the mere translation of texts in the Latin language. This objection must be dealt with and ruled upon before we can go further.

As I understand it, Mr. Jellett's argument on this question may be stated shortly in the following two propositions. In the first place, he says that the Canon Law of the Roman Catholic Church is not "foreign law" within the rule which admits, and, indeed, requires the proof of foreign law by the evidence of experts. In the second place, he says that the Canon Law, for which he refers to a certain printed volume in the Latin language bearing the title "Codex Juris Canonici," is a written contract between the parties to this action, and is to be interpreted and applied by the Court after the manner of a foreign contract in writing according to certain rules which he derives from the opinions in *Di Sora* v. *Phillipps* (1).

I understood the suggestion to be made that the Canon Law is something which is not of the nature of a body of law at all. It is, of course, true to say that it is a subject-matter of which these Courts cannot take judicial notice without proof, and that it is not a law or set of laws which these Courts can enforce as of intrinsic legal authority, propositions which are true of the body of law of every foreign state, as for instance, the Code Napoléon. But it has never before, so far as I know, been contended that the Canon Law is not a scientific legal system and body of law, both substantive and adjective, a body of rules emanating from a legislating authority for the ordering of the conduct, regulating the social and domestic relations, and punishing the disobedience of those who recognise that authority, which speaks and gives judgments through its own tribunals, but now, in these countries, always without coercive power because the machinery of coercion is, at least in

(1) 10 H. L. C. 624.

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this State, kept in the exclusive control of the civil government and parliament for compelling obedience to such laws only as its parliament enacts. Every student of jurisprudence knows to what extent the Roman Canon Law was assimilated by, or influenced national legal systems in Europe. Every student of English Common Law knows that the Canon Law is one of the sources of that Common Law, and, indeed, was citable as law in some English Courts down to comparatively recent times. Blackstone gives the Civil Law and Common Law as together one of the three kinds of the unwritten or Common Law of England. He explains that, notwithstanding that "they are set forth by authority in their pandects, their codes, and their institutions; their Councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both 'branches of the law,'" he classifies them as *leges non scriptae* "because it is not on account of their being written laws, that either the Canon Law or the Civil Law, have any obligations within this Kingdom, neither do their force and efficacy depend upon their own intrinsic authority," but that it is "because they have been admitted and received by immemorial usage and custom in some particular cases" and "some particular Courts of pretty general and extensive jurisdiction." He then describes what in his time constituted the Canon Law. "The Canon Law," he says, "is a body of Roman ecclesiastical law, relative to such matters as that Church either has, or pretends to have the proper jurisdiction over. This is compiled from the opinions of the ancient Latin Fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See. All which lay in the same disorder and confusion as the Roman civil law till about the year 1151." Then, commencing with the codifying effort of Gratian, he gives a sketch of the growth of and additions to the Roman Canon Law down to his own time, showing the composition of what then constituted what he calls "the Corpus Juris Canonici, or body of the Roman Canon Law": Bl. Com. Laws of Eng., Book I, p. 69, *et seq.* Sitting here in this Court we have not of course any knowledge of the state of the Canon Law since Blackstone wrote, or certainly since the jurisdictions of the Ecclesiastical Courts recognised by English Law were transferred to the Civil Courts, but we have admitted evidence in the present case that so far from dying then, or becoming stereotyped, it has had life and growth, so that it came to be codified anew in our own time in a code promulgated in the year 1917 by Pope Benedict XV, to which reference is made by both parties in the present case. For aught we know, the Code may, in the years since 1917 have been added to or altered by the same legislating authority as reduced the then body of Canon Law to the systematic form of a code.

No jurist—certainly none whose study is English Common

Law—would deny to what is called "the Canon Law" of the Roman Catholic Church the character and description of a body or system of Law, and on the facts before us in the present case it is shown to be a living system of law, administered by certain tribunals constituted for that purpose under the same authority from which the laws are derived.

Now it has been urged that the Canon Law cannot be described as "foreign" law, and this has been put on two grounds. It is said, on the one hand, that it is not the law of any particular State or country, and, on the other, that it purports to be universal and therefore of purported validity in this State, and so not "foreign." In my opinion all law is foreign to these Courts other than the laws which these Courts have been set up under the Constitution of Saorstát Éireann to administer and enforce, that is to say, other than the laws given force and validity by Article 73 of the Constitution and the enactments of the Oireachtas made after the coming into operation of the Constitution. No other laws are known to us judicially; nor can we take judicial notice of any other laws, unless they are proved to us as facts. All other laws are extrinsic to these Courts of Justice of the Saorstát and in that sense "foreign" to the Courts. So it is that Scots law is "foreign" in that part of Great Britain which is England.

Finally, this contention of the plaintiff prescinds from our consideration facts of which we must properly take notice, namely, the facts of the existence and international position of the Holy See which maintains diplomatic relations with upwards of a score of States and, amongst others, Great Britain, the Crown having an accredited Minister at the Vatican, and the fact of the existence within a certain guaranteed area in Rome of the Curia and Tribunals of the Holy See administering this very Canon Law as their proper law.

Having carefully examined the argument put forward on behalf of the reverend plaintiff, I am of opinion that the Roman Canon Law is "foreign law" and in the like position as every other "foreign law" to which the rule as to expert evidence has been applied.

While I have discussed at some length this part of the argument for excluding expert evidence of the Canon Law on the basis upon which it was put, and have shown, as I believe, the unsoundness of the contention that the Canon Law is not foreign law, the answer to Mr. Jellett's argument rests upon a broader basis of principle, and the correct view has been, in my opinion, put by Mr. Brown. The proof of foreign law by expert evidence is but one application of a wider principle which is well and shortly stated in Stephen's Digest of the Law of Evidence, Article 49:—

"When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

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"Such persons are hereinafter called experts.

"The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion . . .

"When there is a question as to a foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof."

There follows a statement as to the production by the expert of books, a statement which needs to be read in the light of the authorities, as I will show later.

The same principle is stated in Taylor on Evidence, Vol. II (11th Edition), Sec. 1423, p. 973, as follows:—"In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, and of the usages and customs of Foreign States, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject." Reference to the principal cases in which the question of proving foreign law by expert evidence is discussed, supports the proposition for which I have cited the two text-writers, namely, that the established practice as to the proof of foreign law is a special application of the general rule with reference to all subjects, the knowledge of which and the formation of opinions on which require a course of special study or experience: *Lord Nelson* v. *Lord Bridport* (1); *Baron de Bode's Case* (2).

That the Canon Law is such a subject hardly needs discussion. A volume containing the recent codification of that law, together with a number of other documents, presumably bearing upon some of the subject-matters of the Canons, has been produced to this Court. The Code itself contains 2414 canons with many sub-sections, and deals with an immense variety of topics. It appears to be, not a mere sum of separate rules, but a whole, a system, in which the separate canons have their place and their relation to each other and to the whole. It is the most recent of a series of periodic codifications called for by the accumulation of decrees and probably by the experience gained in the administration of its own tribunals. It was promulgated in the year 1917. Portion of the Code which was under discussion here had previously been the subject of a decree published in the year 1910. Before that again the position of a Parish Priest had been subject to other canonical regulations. It is, as I have said, a body of living law, of systematic law, and in daily use in its own Courts, with the necessarily resulting growth of interpretation and authoritative opinion. One of the expert witnesses examined states that, after a course of study of Canon Law in Maynooth College, he was sent by the Trustees of Maynooth College to Rome to study a special course of Canon Law for two years. To borrow Lord Brougham's phrase in the *Sussex Peerage Case* (3) these

(1) 8 Beav. 527. (2) 8 Q. B. 208. (3) 11 Cl. & F. 85.

Courts "have not organs to know and to deal with the text of that law."

I must now refer to one matter urged by Mr. Jellett in support of his contention that the expert evidence must be excluded from consideration. Unable to cite the ruling of any Court as a basis for this argument, he referred to *Ussher* v. *Ussher* (1), and he said that the Judges in that case themselves construed the Decree of the Council of Trent and the Decree Ne Temere without expert assistance, and he relied upon it as a negative authority in favour of his proposition. Two witnesses only were examined at the trial of that action, one, the priest who performed the marriage rite impeached by the petitioner, the other, his Bishop, the Most Rev. Dr. Gilmartin. It is clear from the report that Dr. Gilmartin did give evidence upon the interpretation of the Decree of the Council of Trent, see judgment of Kenny J. at pages 449, 454, and 464, and argument of counsel at pp. 476–477.

But it also appears that the marriage law of the Roman Catholic Church was not proved and found as a fact, and that the Divisional Court considered it should have been. Palles C.B. says at p. 493—"For reasons which I shall mention later on, I assume it to have been proved or admitted at the trial that the absence of the second witness rendered the marriage null, according to the law of the Roman Catholic Church." At p. 510, he explains that his reason for making the assumption was that, the Judge at the trial having taken a special verdict which had not been made up or signed, he was of opinion that "there should have been, in the findings, a clear concrete statement of the law of the Roman Catholic Church as to the effect on the marriage in question of the absence of a second witness, and a statement as to whether or not, according to that law, the marriage in question was null and void." That is to say, the law should have been found as a fact on proper evidence, which is the rule as to all foreign law. Gibson J. says at p. 512—"The evidence was very unsatisfactory. The petitioner was not examined. No canonist was called to elucidate the peculiar matrimonial law of the Church of Rome, which in this country is a voluntary Church, and whose discipline must be proved as a fact." *Ussher* v. *Ussher* (1) is therefore no authority in favour of Mr. Jellett's argument.

Mr. Jellett has wholly failed to meet the *Sussex Peerage Case* (2), which seems to me to be direct and powerful authority against him. That case was concerned with the question of the validity of a marriage between two English Protestants resident in Rome, who went through a form of marriage according to the rubric of the Church of England before a Protestant clergyman in Rome. The marriage affected the British royal family, and the question of its validity was referred by the Crown to the House of Lords. At that time, the laws of Rome did not recognise any marriage except those celebrated according to

(1) [1912] 2 I.R. 445. (2) 11 Cl. & F. 85.

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Roman Catholic ritual. Dr. Wiseman, afterwards Cardinal, but then co-adjutor Bishop to the Roman Catholic Vicar Apostolic of the central district of England and presiding over the Roman Catholic College at Oscott, was called as a witness to give evidence as to the law at Rome on the subject of marriage, that is to say, evidence as to the Canon Law of the Roman Catholic Church which was the law then governing the matter in Rome, and the practice of the Roman Courts. It was ruled that that law must be proved as a fact by the evidence of "skilful and scientific" witnesses, expert in the particular law and its interpretation, and not merely by showing a book or text of the law. The territorial area in Rome within which the Curia and tribunals of the Canon Law jurisdiction sit and function may have now become very much smaller than when Dr. Wiseman's evidence was tendered to the House of Lords, but that circumstance does not affect the principle established by the ruling as to the method by which the Canon Law is to be proved in these Courts. The competence of Dr. Wiseman as an expert witness was also debated. Dr. Wiseman, having proved that as a Bishop in England he was called upon to deal with marriage cases from the point of view of the Roman Catholic Church and according to Roman Canon Law, it was held that he came within the description of a person *"peritus virtute officii"* in relation to Canon Law, and his evidence—which Lord Langdale described as "of the nature of that of a Judge"—was admitted to prove that law. It will be found printed in an Appendix in the Reports (11 Cl. & F. Appendix).

I am clearly of opinion that the Canon Law of the Roman Catholic Church is, in these Courts of the Saorstát, "foreign law" within the meaning of the rule I have been discussing, and, therefore, that the Canon Law applicable to the circumstances of a particular case must be proved as a fact in the particular case, and that it must be so proved by the testimony and opinion of competent expert witnesses shown to possess the skill and knowledge, scientific or empirical, required for stating, expounding, and interpreting that law.

Before leaving this question, I may add, as a matter of interest, that I have had an opportunity of reading the lengthy judicial notes and report of Chief Justice Whiteside of the trial in the year 1873 of the celebrated action of *O'Keeffe* v. *Cullen* (1), which were published by the British Government as a Government Paper through the English Stationery Office. The history which culminated in that remarkable trial has many points of resemblance to the present case. The trial was notable for the skill and learning of the advocates at the service of both parties and for the attitude of the trial Judge, bristling with horror throughout because of the inroad which he believed was being made into the foundations of the British Constitution by recognising, even on a consensual basis, the works and pomps of the Roman Canon Law. Yet, in that trial, expert evidence

(1) Reported on demurrer, at I. R. 7 C. L. 319.

as to Canon Law and, in particular, as to the procedure at Canon Law tribunals was tendered expressly under the rule of evidence I have just discussed and was received from a number of witnesses, including two Bishops, whose testimony was admitted as of persons *periti virtute officii*, and two Italian Canonists brought from Rome and examined through interpreters.

I now come to another aspect of this legal question, the aspect in which it was most strenuously argued by Mr. Jellett. He said that this is a case of a contract between the two parties, that the contract is in writing, that the text of the written contract is the Codex Juris Canonici, that it is a foreign contract in a foreign language, and that as such it must be dealt with by the Court according to certain principles propounded as resting on the authority of *Di Sora* v. *Phillipps* (1), the practical effect of which would be to exclude expert evidence except for purposes of translation.

Inasmuch as Mr. Jellett's whole argument on this appeal has hung upon the contractual relations of the parties, the form of pleading is the more remarkable. The Statement of Claim as pleaded was based upon certain contentions as to the requirements of the Canon Law, and certain canons were quoted as though they were the sections of a statute of which the Court would take judicial notice and upon which the Court would declare the plaintiff's right as if under the ordinary law administered by the Court. It was only at the trial and, as I gather, at a late stage of the trial, that the statement of claim was, under pressure from the Judge, amended so as to place the plaintiff's claim on the basis of agreement, the only basis upon which it could have been legally presented to the Court.

The legal status of the Roman Catholic Church as a non-established Church in this country was elaborately examined and defined in the case already referred to, viz.: *O'Keeffe* v. *Cullen* (2), which was an action by a Parish Priest who sought, by way of suing Cardinal Cullen for defamation, to challenge the validity of a sentence of suspension from and deprivation of the office of Parish Priest. The position was there laid down, and accepted ever since, as that of a voluntary association of persons who agree to accept and to be bound by certain doctrine and discipline and to submit to the authority of certain voluntary ecclesiastical tribunals, these tribunals in the case of the Catholic Church administering and applying the body of law and system of procedure of the Roman Canon Law. The corresponding position of members of the Church of Ireland after the disestablishment of that Church, was defined in Section 20 of the Irish Church Act, 1869, which may be cited as a useful enunciation of the principle:—

"20. The present ecclesiastical law of Ireland, and the present articles, doctrines, rites, rules, discipline, and ordinances of the said Church, with and subject to such (if any) modification or alteration as after the first

(1) 10 H. L. C. 624. (2) I. R. 7 C. L. 319.

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day of January, 1871, may be duly made therein according to the constitution of the said Church for the time being, shall be deemed to be binding on the members for the time being thereof in the same manner as if such members had mutually contracted and agreed to abide by and observe the same . . . .''

The section I have just cited may, I think, be taken as declaring for the members of the Protestant Episcopalian Church in Ireland, upon its ceasing to be an established, or State Church, the legal position of a non-established Church as it had been then recently laid down in a number of cases which will be found discussed in *O'Keeffe* v. *Cullen* (1), where it was shortly afterwards laid down as regards the Roman Catholic Church in Ireland.

By the amended plea raising the case of contract, the plaintiff avers that—''The plaintiff on becoming Parish Priest as aforesaid, and the defendant as such Bishop agreed to be, and are bound by the Laws, Ordinances, and Canon Laws of the said Church, regulating their said respective offices,'' and he relies on the matters complained of as ''breaches by the defendant of the said Laws, Ordinances, and Canon Laws of the said Church and of the terms of the said agreement.'' Now, as I have already said, the Canon Law is not something which is dead, stereotyped for all time. It is a living system of laws subject to alteration, modification, addition by the Pope as supreme legislating authority of the Roman Catholic Church as he may be advised or find necessary for the better government of his domain. Therefore, I think we must read the averments just quoted as though the words ''the Laws, Ordinances, and Canon Laws'' were qualified by the words ''for the time being.'' This must be the meaning and intention of the averment, having regard to the citation of the Codex promulgated in 1917 in support of the plaintiff's case, although he became Parish Priest in the year 1904. In this sense, the agreement as averred in the amended statement of claim is common case.

Now, the way Mr. Jellett puts this branch of his argument is this—He says that here you have a foreign contract, or something in the nature of a foreign contract, and he holds up a printed copy of the Codex Juris Canonici, 1917, and says that the contract is a contract in writing, and this volume contains the written text of the contract (a contract which I may say here—I will return to it later—was not proved in evidence on the part of the plaintiff). He then argues that though the Court may have recourse to the assistance of skilled persons to translate the Codex into English and to interpret words which are terms of art, and, I think, he admits, to state any special rule of construction, no other expert evidence is admissible, and the Court must take the Codex and construe it for itself as best it can, and upon its own reading (unaided save as aforesaid) determine the rights of the parties. This argument is stated to rest on *Di Sora* v. *Phillipps* (2), a case which

(1) I. R. 7 C. L. 319. (2) 10 H. L. C. 624.

curiously enough was quoted to Chief Justice Whiteside at the trial of *O'Keeffe* v. *Cullen* (1), not against, but in support of the admission of the expert evidence of Canon Law there received.

In my opinion, the argument is quite fallacious. We are not dealing with a foreign contract. The contract is the contract of appointment of the plaintiff as Parish Priest—a contract made in Ireland between two Irish parties. It is a term of that contract that the parties are to be bound by a foreign law regulating their respective offices. They might have agreed to be bound by Scots Law or by the Code Napoléon. *Di Sora* v. *Phillipps* (2) is actually a clear authority that in such a case the Court *must* obtain evidence of the foreign law applicable to the case. Indeed, on reading the judgments, I find this so clearly laid down that I am at a loss to understand how it could be relied upon here as it has been.

On the whole of these legal contentions then, my opinion is—

(1) That the Plaintiff, by his amended statement of claim, comes here suing on foot of a contract by which the then Bishop of Kerry appointed him to, and he accepted the office of Parish Priest in the said Diocese:

(2) That it was a term of that contract, that each party agreed to be bound by the Laws, Ordinances, and Canon Laws for the time being of the Roman Catholic Church:

(3) That the Canon Law of the Roman Catholic Church is "foreign law" which must be proved as a fact and by the testimony of "expert witnesses" according to the well-settled rules as to proof of foreign law to which I will refer later.

I will now consider shortly how the case stands on the pleadings and on the evidence before us.

The plaintiff's evidence is confined to the facts and documents of which I gave a résumé at the beginning of this judgment, that is to say, the two decrees complained of and the events leading up to them. He also negatived the issue of a citation or the giving of notice to him so as to enable him to appear and be heard before the respective decrees were pronounced. The evidence of the plaintiff's other witness, the classical scholar, was confined to verifying the translations of certain texts as having been made by him. The plaintiff did not purport to be an expert in or to have any knowledge of the Canon Law. The classical scholar expressly disclaimed any skill in deciphering ecclesiastical documents.

The "texts" referred to are presumably the documents numbered 25 to 28 in the schedule of documents entered for the plaintiff, annexed to the judgment of the High Court, viz.: 25, "Canons of Codex Juris Canonici, No. 1711–1725 inclusive"; 26, "Translations of the said Canons including title"; 27, "Canon 2145 and Canons 2147 to 2156 inclusive of said Codex";

(1) I.R. 7 C.L. 319. (2) 10 H.L.C. 624.

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28, "Translations of same." That means no more than this, that some twenty-six canons have been extracted from a codex and entered as evidence with translations verified as correct translations. No evidence, expert or otherwise, was given on the part of the plaintiff to prove the particular Codex as a statement of the Canon Law by which the defendant and he were bound. No evidence, expert or otherwise, was given on his behalf verifying the extracted texts as containing the Canon Law applicable to the particular case, and he knew from the defence that that matter was in controversy in the action. In my opinion, it was essential for the plaintiff's claim to prove as matter of fact by expert evidence the Canon Laws in force and properly to be applied to the facts and circumstances of the case, alleged violation of or non-compliance with which laws constitute the plaintiff's cause of action.

In my opinion, therefore, the action should have been dismissed at the close of the plaintiff's case. The defendant, however, probably desired to establish the regularity and propriety according to Canon Law of the course he had followed. He therefore did not, at that stage, ask that the plaintiff be nonsuited, but undertook to establish his defence, and for that purpose offered the evidence of two expert Canonists. The first was the Rev. Dr. Kinane, a Doctor of Canon Law, Professor of Canon Law at Maynooth, and qualified by a special course of study of Canon Law in Rome. No objection was taken to the competence of the witness as an expert, but objection was taken to the admissibility of expert evidence, except for the limited purpose of proving translations. The witness was, however, cross-examined at length by the plaintiff's counsel for the purpose of eliciting opinions favourable to the plaintiff's contentions. In my opinion, for the reasons I have already stated, the evidence was properly admissible and could not be rejected. Further, the evidence of this witness and of the second Canonist, the Rev. Dr. O'Neill, was the only evidence before the High Court, and is the only evidence before us, of the Canon Law in fact applicable to the case. I will now state shortly the purport of the evidence of these learned gentlemen.

Dr. Kinane says that the Canon Law of the Roman Catholic Church provides for two modes of removal of what is described as an "irremovable Pastor." "Irremovable Pastors" he explains, are Parish Priests who have a greater amount of stability in their parishes than other Parish Priests. They can only be removed for the reasons and with the observance of the formalities prescribed by Canon Law. (It was admitted that the plaintiff belonged to the class of "Irremovable Pastors.") The two modes of removal of such Parish Priests are, he says, "judicial removal" and "administrative removal." The principal distinction he draws between the two modes is that a "judicial removal" can only take place on a grave *crime*, being

a crime specifically mentioned in the code; while in the case of "administrative removal" the cause is something which may be culpable or non-culpable, something which renders the Parish Priest's ministry in his parish harmful or useless. It is a matter of the parish and not of the priest. Dr. Kinane refers to the Codex Juris Canonici (a copy of which, bearing the imprint of publication at Rome in the year 1918, has been entered in evidence for the defendant), and his evidence is that the Canons numbered from 2147 to 2156 inclusive, and no others, relate to the process of administrative removal of a Parish Priest. These Canons, together, constitute the matter of a single title—"*De modo procedendi in remotione parochorum inamovibilium*"—a complete section of the Third Part of the Fourth Book of the Codex. He says that this group of Canons was taken substantially from a Decree known as "*Maxima Cura*" published in the year 1910, and which was drawn up by the Commission appointed in the year 1903 to codify the Canon Law. Prior to "*Maxima Cura,*" as I understand from the evidence, there were no Canons of this kind dealing specifically with the removal of Parish Priests by administrative act, but there was old Canon Law dealing with the case of Bishops who could be removed for certain causes, one of which was *odium plebis.* In course of time, by process of interpretation and analogy, the old law as regards Bishops came to be applied to the case of Parish Priests. The Canon Law Commission considering, as one would infer, that the law on this matter was in an unsatisfactory state and required early definition, drew up an interim code on this topic which was issued as the Decree "*Maxima Cura,*" and afterwards embodied in the complete Code. The evidence of Dr. Kinane is that the Canons taken substantially from the Decree "*Maxima Cura,*" numbered 2147 to 2156 inclusive in the Codex, and there grouped under the title which I have read, contain the whole Canon Law and procedure relating to the removal of a Parish Priest who is "*parochus inamovibilis,*" by administrative Decree, that is to say, removal of the Parish Priest in the interests of the ministry in a particular parish without putting the Parish Priest on trial to answer some grave charge against himself personally. He says that these Canons contain no provision requiring the service of a "*Citatio*" on the Parish Priest in such cases, and that, in his position, "*Citatio*" is no part of and has no place in the procedure leading to "administrative removal," and that there is nothing in the prescribed procedure for such a Decree to require the personal attendance of the Parish Priest for a personal hearing by the Bishop as a preliminary to the making of the Decree. He gives it as his opinion, having read the various documents proved, that the removal of the plaintiff from his parish by the Decree set out in the statement of claim, which purports to be made in pursuance of the Canons Nos. 2147–2156, and is based on two of the grounds specified in

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Canon 2147, Sec. 2, viz.:—"*Odium plebis*" and "*mala rerum temporalium administratio,*" was carried out in accordance with these Canons and with the rule of the Church.

Now the plaintiff's entire case depends upon his claim that he should have been served with a "*Citatio*" and that failure to do this has invalidated the Decree of Removal. Certain Canons numbered 1712, 1715, 1723, and 1724, are set out in the statement of claim as establishing an obligation to issue and serve a citation upon the party affected before making a Decree of Removal. The plaintiff did not offer any evidence to prove that the texts so quoted contained the Canon Law or part of the Canon Law applicable to his case. The texts themselves contain no reference to the removal of Parish Priests. Dr. Kinane was, however, examined and cross-examined with reference to them, and his evidence on the point is shortly as follows:—The Codex, which deals with divers subjects, is divided into Books, though the Canons are numbered consecutively throughout. The fourth Book, commencing with Canon No. 1552, is entitled "*De Processibus*" and comprises the regulations prescribed for various judicial and other proceedings. This Book of procedure is divided into three separate and distinct parts:—the First Part containing the Canons numbered from 1552 to 1998, under the title "*De Judiciis,*" deals with judicial proceedings; the Second Part, containing the Canons numbered from 1999 to 2141, under the title—"*De Causis Beatificationis Servorum Dei et Canonizationis Beatorum,*" deals with the procedure of Beatification and Canonisation; the Third Part, containing the Canons numbered from 2142 to 2194, under the title—"*De Modo Procedendi in nonnullis expediendis Negotiis vel Sanctionibus Poenalibus Applicandis,*" deals with the procedure in several matters. It is sub-divided into sections or titles each complete in itself, one of which is—"*De modo procedendi in remotione parochorum inamovibilium,*" consisting of the Canons numbered from 2147 to 2156, dealing with the procedure for administrative removal of Parish Priests. The Canons quoted in the statement of claim are four picked from the 446 which make up the First Part of the Fourth Book of the Code. Dr. Kinane says that that part of the Code has no application to the proceedings in the present case which were not judicial but administrative proceedings, carried out, not under the First Part, but under the Third Part of the Fourth Book of the Code. He says that the plaintiff was not a *reus* or person accused of a grave crime, or summoned to be judicially charged and tried, the judgment against him on the charge involving loss of his parish. He says that in the procedure adopted by the defendant under the Third Part of the Fourth Book the plaintiff was not a *reus*. He might by that procedure be removed from office as an administrative act even where no culpability was established against him. This is clear from the terms of Canon 2147. It provides for removal

"*ob causam, quae ipsius ministerium, etiam citra gravem suam culpam, noxium aut saltem inefficax reddit.*" Among the causes specified is—"*Odium plebis, quamvis iniustum et non universale, dummodo tale sit, quod utile parochi ministerium impediat, nec brevi cessaturum praevideatur.*"

The distinction between the two kinds of procedure is actually illustrated by concrete examples in the evidence before us. The Decree of the 11th July, 1919, whereby the plaintiff was adjudged liable to pay certain moneys to his curates, was made in a judicial proceeding within the First Part of the Fourth Book of the Code, and in that matter a *citatio* was duly served on the plaintiff and he appeared before the tribunal. The course followed in that case marks the difference in the subsequent or administrative proceeding, which the plaintiff challenges in the present action.

The evidence given by Dr. Kinane was corroborated by a second expert witness, the Rev. Dr. O'Neill, a Doctor of Canon Law and Professor of Canon Law and Moral Theology. Both Canonists agree in their evidence that none of the Canons quoted by the plaintiff in his statement of claim applies to the present case, and that no citation of the plaintiff was necessary for the purposes of the Decree complained of, and in fact that "*citatio*" is no part of the procedure for that Decree.

Such then is the evidence as to the Canon Law applicable to the case, the evidence of two experts in the subject. No evidence, expert or otherwise, has been tendered to displace it. Instead of evidence, we have four or five Canons picked out of this large and complicated body of law, and, separated from their context without evidence to explain them or to justify the plaintiff's reliance upon them, presented to the Court at their individual face value by counsel for the plaintiff who say that these particular canons have not been complied with (which is admitted) and that it is to be assumed that such compliance was required, which is a non-sequitur. The plaintiff might just as well have picked from the same Book of the Code some of the Canons of the procedure for canonisation and founded claims on his simple *ipse dixit* that they applied to his case.

I have stated my opinion that the Canon Law applicable to the case must be proved as a matter of fact by expert witnesses as foreign law in these Courts. That has been done by two witnesses called on behalf of the defendant. The testimony of both is to the same effect. No other skilled evidence has been given. In my opinion, the Court must accept that evidence, unless obviously false or discredited in some way, in which event, too, the plaintiff would fail because he has not on his part proved the applicable law in fact, if it be not what has been proved by these witnesses.

The rule is that the foreign law applicable to a case must be taken from the statement of the expert witness as to what the law is, and not from text-books or codes referred to by him.

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During the hearing of the *Sussex Peerage Case* (1), Dr. Wiseman was observed to refer to a book, presumably some volume of Canon Law, and a discussion arose, whereupon the rule was restated; Lord Brougham put it thus in a passage very often quoted: "The witness may refer to the sources of his knowledge, but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it." Lord Denman said: "A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so," and he referred to the rule as laid down in *Baron de Bode's Case* (2). There the question arose as to whether a French advocate could be permitted to prove the effect of a certain decree without proving the original text of the decree, and it was held that not merely was the evidence admissible but it was the proper evidence of the state of law created by the decree. An objection was taken, based on the rule as to secondary evidence of written instruments. "But," said Lord Denman (3), "there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents indeed might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument." The judgment of Lord Langdale in *Lord Nelson* v. *Lord Bridport* (4) is a *locus classicus* on this subject, and has been referred to with much approval in the House of Lords. It is an elaborate judgment on the whole subject of proving foreign law. I wish to refer to it in so far as it deals with one aspect of the matter in particular. Two foreign jurists, called in that case to prove the law of Sicily in certain matters, in the course of their evidence referred to certain passages indicated or marked in certain text-books identified by them. Two questions were discussed upon this evidence which are relevant to the present case, namely, first, whether the Court could examine for itself the passages indicated and form its own opinion of the law from them; and, secondly, whether the opposing party could take from the same books passages other than those marked and cited by the expert witnesses and use them for the purpose of making a case on the foreign law conflicting with the evidence of the experts. On the first question, Lord Langdale says: "If the utmost strictness were required in every case, justice might often

(1) 11 Cl. & F. 85.
(2) 8 Q.B. 208.
(3) 8 Q.B., at p. 250.
(4) 8 Beav. 527.

have to stand still; and I am not disposed to say that there may not be cases in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony." He then refers to *Lindo* v. *Belisario* (1) and *Dalrymple* v. *Dalrymple* (2), in which cases, he says, the evidence not being clear and positive, Lord Stowell went beyond the actual evidence, but not further than the evidence fairly led. Lord Langdale adds: "But such cases seem to be exceptions to the general rule, and in all of them it would be necessary to use great caution." Later in the judgment, having examined the principle upon which the expert witness may cite books and laws as amongst the subjects of his consideration in the formation of his opinion (by which it is that the Judge is to be influenced, and not by the authority of the laws or by the text-writers), he says, as to a Judge considering the citations from books (3): "If he reads them, they may appear to him to accord with the testimony or to differ from it. If, in his view, they accord with it, nothing is gained. If, in his view, they differ from it, he, being ignorant of the foreign law, cannot weigh his opinion against the clear and uncontradicted opinion of the witness, whose opinion ought to be derived, not only from the citation in question, but from all the sources of his knowledge of the law of which he is speaking." I wish to emphasise what follows: "The citations, however, appear to me to be material, and to require the most careful attention of the other party, who may avail himself of them, for the purpose of correcting any error or supplying any defect in the opinion of the witness already examined, by means of other witnesses to be afterwards examined for the purpose. This, however, must be done in a proper manner." The judgment of Lord Langdale, from which I have been citing, is, having regard to the approval it has received, to be taken as an exposition of the settled principles upon which the Court will deal with the proof of foreign law. *Concha* v. *Murrieta* (4) is cited in some of the text-books as though it departed to some extent from the principles laid down by Lord Langdale and so often approved. It is cited by some text-writers as an authority for the bare proposition that the Court may examine passages quoted by expert witnesses and consider what is their proper meaning. The headnote is probably responsible for this reading of the authority of the case, and needs qualification, for the report shows that it was a case of conflict of expert witnesses as to the foreign law applicable. The ruling, therefore, is in precise accord with the principles laid down by Lord Langdale.

As to the second question I have mentioned, namely, the attempt to attack passages cited by witnesses from books by opposing to them other passages from the same books, Lord

(1) 1 Hagg. C. R. 216.
(2) 2 Hagg. C. R. 54.
(3) 8 Beav., at p. 541.
(4) 40 Ch. D. 543.

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Langdale refused to allow this to be done. He declined to assume the passages attempted to be used in that way to be valid law without the evidence of expert witnesses that the fact was so.

Applying these principles to the present case, we have, on the one side, two skilled and scientific witnesses, whose competence and whose honesty have not been questioned. They have given evidence as to what in fact is the Canon Law applicable to the present case, and there is no difference of opinion between them. They have also proved that a certain group of Canons in the Codex, and no others, are relevant to the present case. Their testimony was not broken down or modified by cross-examination. No evidence has been given on the part of any other skilled witness to correct them, or to show them in error, or to prove that the Canon Law applicable to the case was in fact otherwise than the two doctors say it is. In these circumstances, the Court must, in my opinion, take the fact of the applicable law as proved by these witnesses and act upon it.

In my opinion, therefore, the plaintiff has failed in so far as his cause of action rests upon the alleged necessity according to Canon Law for the issue and service of a *citatio* or process of that nature, or for any hearing in person before the making of the Decree of Removal complained of in the statement of claim.

Mr. Jellett, however, then opens up a new line of argument. He says that, if the Canon Law does not require a citation to be served or a personal hearing to be granted in these cases, these are requirements of "natural justice," and the Decree of Removal made without a preliminary summons to appear, and without a personal hearing, is contrary to "natural justice," and therefore should be declared by the Court to be invalid and of no effect on that ground. This argument is hardly consistent with the vigorous insistence throughout on the contract rights of the plaintiff. The case here has been put by Mr. Jellett in the most unequivocal way as founded on contract, that is to say, on the contractual relation arising from the plaintiff's appointment as Parish Priest, to which I have already referred, in consequence whereof both Priest and Bishop are bound by the Canon Law for the time being in force, whatever it may be.

This branch of the argument was really not put upon any scientific basis, nor were the cases in which natural justice has been invoked (of which there are many) examined with a view to showing that the present case came within the principle of one or other of the classes of case in which that has been done. Mr. Jellett cited three reported decisions which are not *in pari materia* with one another. He referred to *Shaw* v. *Attorney-General* (1), which is an example of the class of case in which the Courts in these countries have refused to act upon the judgment of a foreign court, on the ground that the particular judgment offended against natural justice. In that

(1) L. R. 2 P. & D. 156.

case, a husband and wife both having an English domicile, the wife went to reside in the United States. While there she obtained a divorce without notice to the husband. She subsequently remarried and later returned to England. It was held that the American divorce was of no effect in England against the husband, because in the circumstances he had never submitted to the jurisdiction of the American Court and had never by any act of his laid himself open to be affected by its process, and it would be contrary to natural justice for an English Court to bind him by its decree. Mr. Jellett has not cited any authority in this class of case to show either (*a*) that where a person has voluntarily bound himself by contract to submit to the jurisdiction of a particular foreign tribunal, he will be subsequently heard to attack the result on the ground that its procedure is not in accordance with natural justice; or (*b*) that these Courts will interfere with the operation of a foreign tribunal upon matters within its own sphere of jurisdiction, such as status or rights arising under and effective only within the field of its own law, so as to exercise a supervising moral control under the guise of natural justice.

The second case referred to by Mr. Jellett, *Fisher* v. *Keane* (1), belongs to quite a different class, namely, to the class of case (of which there is also a number) where a member of a club is charged with some grave offence, tried by a committee, convicted of the offence without notice or hearing, and expelled. The execution of the sentence in such circumstances has been deemed repugnant to natural justice and not effective to deprive the member of the rights he acquired in law by entering into the legal relation of membership, at any rate in the case of a club whose rules do not give the committee an absolute power of expulsion, a qualification which was not developed in argument.

The only other case referred to by Mr. Jellett was *The King* v. *Cambridge University* (2), where Bentley was charged and tried in a University Court, as it was held, without notice, found guilty and subjected to a sentence which in the circumstances was held invalid. This case was really cited for the rhetorical value of the rather inept story of Fortescue J.

In all these cases the aggrieved individual complained of a judgment *in personam* by a tribunal to which he had not submitted or which, without express jurisdiction, proceeded without notice to convict and sentence an absent accused. None of them was a case of administrative as distinguished from judicial action, of terminating the tenure of the remunerated office or appointment of trust and responsibility (to say nothing of sacred or spiritual character) as a matter of administration. If the authorities quoted have application to such cases, a host of office-holders, civil servants, army officers, and others may rejoice in a new stability of tenure based upon *jus naturale*.

(1) 11 Ch. D. 353. (2) 1 Strange, 557.

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I do not, however, consider it necessary on this occasion to pursue the question beyond what I have said as to the application of the three cases cited by Mr. Jellett and for this reason. On the facts and documents before us, taken in conjunction with the Canon Law procedure proved to be applicable to the case, I am of opinion that no case of want of notice has been established. I am not now referring to the "*citatio*" which has been shown not to be required by the Canon Law, but to notice generally, upon which the appeal has been made to natural justice.

Upon the charge of failing to maintain his curates and expelling them from the parochial house, the plaintiff was duly cited, tried in his presence, and adjudged liable to make good his default by payment of certain sums of money. Immediately after the decree had been pronounced in that case, on the 11th July, 1919, the first step was taken in the procedure laid down by Canons 2147 to 2156 for the removal of Father O'Callaghan from his parish. That step was an invitation to resign the parish within ten days, given pursuant to Canon 2148. It was stated to be based on two of the grounds specified in Canon 2147, viz.: *odium plebis* and *mala rerum temporalium administratio*. For proof of the first, he was referred to his own statements about his parishioners as, for instance, in the course of the protest he had lodged at the trial on that day. For proof of the second, he was referred to his failure (*a*) to collect his house cess and his declaration that he would pay the cess no longer; (*b*) to make the seminary collection for the year 1918; (*c*) to pay his fire insurance premium. The invitation gave him full notice of the grounds upon which it was sent to him.

Now, as Dr. Kinane has proved, the issue of the invitation to resign gave the plaintiff certain rights under the Canon Law. He may present a reasoned argument against the invitation. This he would do in writing. Dr. Kinane's evidence is that he had no right to present the reasons *vivâ voce* in person. He may ask for delay for the purpose of producing proofs. Father O'Callaghan, of course, did not comply with the invitation to resign, nor did he ask for delay for the purpose of producing proofs. He simply wrote to the Bishop the letter of the 15th July, 1919, which I have read. He in substance admits the existence of *odium plebis*, the non-payment of the seminary contribution and fire cess, and denies that he is in fault as regards any of them. No delay for proofs having been asked for, the next step is under Canon 2152, by which the Bishop is required to have a meeting with the same two Synodal Examiners, after consultation with whom the original invitation to resign was issued. Having heard the Examiners, he weighs the reasons adduced against the invitation, and comes to a decision which is conveyed to the Parish Priest by way of a Decree. This procedure was carried out on the 8th September 1919, when it was decided that a Decree of Removal ought to issue against the plaintiff.

The Decree of Removal was not actually issued until the 15th November, 1919. It was accompanied by a letter from the defendant to the plaintiff informing him that if he had any new facts or arguments regarding the subject-matter of the Decree, they would be considered by the Bishop and two Consultors if sent within ten days. This letter called Father O'Callaghan's attention to his rights under Canon 2153. On the 19th November, the plaintiff sent to the Bishop a letter of which I have already read part, long, abusive, with some discussion of the points, but largely a mass of contumacious invective which the plaintiff mistakes for argument. The letter also contains this—"Under the Codex I claim the suspension of your Decree until it will be possible for me to find an advocate." There is no provision in the Codex for such suspension. There is a limit of ten days prescribed. Dr. Kinane's evidence is that no advocate can be heard under the procedure in this section of the Code. On the 16th December, 1919, the Bishop sat with his two Consultors to consider the allegations in the letter of the 19th November as well as the original allegations and depositions, as required by Canon 2153, and it was decided to confirm the Decree of Removal.

Dr. Kinane and Dr. O'Neill agree in the opinion that these proceedings were in all respects regular according to the Canon Law, that there is no provision for the personal attendance of the Parish Priest at either of the Bishop's consultations, the one with his Examiners, the other with his Consultors, that an advocate cannot be heard at such consultations, that the Parish Priest is given two opportunities of making his case, the one after the invitation to resign, the other after the Decree of Removal, in both cases by statement in writing, but with liberty to apply to have evidence taken. In face of all these requirements of the Canon Law and in face of the twofold notice required and given, and the many precautions imposed for the security of the Parish Priest, it is, in my opinion, a travesty of every known occasion for calling in aid natural justice to suggest that this is within the principle of any of them.

On a full consideration of every ground put forward in support of this appeal, I am of opinion that the plaintiff (appellant) has wholly failed, and that (while not adopting all the reasoning of Meredith J.) the appeal should be dismissed, with costs.

O'CONNOR and FITZGIBBON JJ. concurred.

Solicitor for the appellant: *A. Lane Joynt.*
Solicitor for the respondent: *E. J. Downing.*

R. L. S.

Supreme Court.
1925.
March 11.
April 18.

MARY JOSEPHINE BYRNE AND ANNA PHILOMENA BYRNE, PLAINTIFFS, *v.* ELLEN HUGHES, DEFENDANT (1).

(1925. No. 1914.)

Practice—Transfer of action—Action commenced in High Court—Transfer to Circuit Court—Whether action could have been commenced in Circuit Court—Absence of Rules and Forms for procedure in Circuit Court—Equitable and Common Law claims combined—Part of claim exceeding jurisdiction of Circuit Court—Striking out part of claim—Courts of Justice Act, 1924 (*No.* 10 *of* 1924), *sects.* 25 *and* 48 (iii).

Plaintiffs commenced an action in the High Court which could not have been commenced in, or remitted to the former County Court, but which (except as to portion of the relief sought) was within the jurisdiction of the Circuit Court. They resisted an application to transfer the action under sect. 25 of the Courts of Justice Act, 1924, to the Circuit Court on the ground (*inter alia*) that the action could not have been commenced in the Circuit Court, as required by that section, since the existing procedure of that Court, being still that of the former County Court, was inadequate, no Rules or Forms having been made for procedure in the Circuit Court:

Held, reversing Meredith J., that though the absence of Rules of Forms is an obstacle in the way of litigants which may justify them in commencing in the High Court proceedings which might more properly be tried in the Circuit Court, this cannot deprive the High Court or the Supreme Court of the power to transfer, or the Circuit Court of the power and duty to hear a case which the Circuit Court has jurisdiction to entertain, and which is not fit to be prosecuted in the High Court.

If the Courts of Justice Act, 1924, has conferred jurisdiction upon either the Circuit Court or the District Court to entertain a case, the Court cannot be deprived of that jurisdiction by the non-existence of Rules of procedure or Forms.

Tevlin v. *Lisnaskea Rural District Council* [1914] 2 I.R. 15; *Canning* v. *Farren* [1907] 2 I.R. 486; and *Attorney General for Ontario* v. *Daly* [1924] A.C. 1011, followed.

As the portion of the plaintiffs' claim which exceeded the jurisdiction of the Circuit Court appeared to the Supreme Court to be wholly unsustainable, even upon the allegations of the plaintiffs themselves, and must have been inserted either through inadvertence or with the express object of defeating an application to transfer the action to the Circuit Court:

Held, following the former practice in similar cases under the Common Law Procedure Amendment Act (Ireland), 1870, that the portion of the claim which exceeded the jurisdiction of the Circuit Court should in part be struck out, and the action, subject to this amendment, should be transferred to the Circuit Court.

Courtenay v. *M'Donnell,* I.R. 6 C.L. 35; *Cox* v. *Dalton,* 12 L.R.Ir. 420; and *Clarke* v. *Doherty,* 32 Ir.L.T.R. 43, followed.

APPEAL from an order of Meredith J., dated the 17th February, 1925, refusing to transfer the action for trial to the Circuit Judge of the City and County of Dublin.

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Plaintiffs were the occupiers of the premises, No. 40 Lower Gardiner Street, Dublin. Defendant was the owner of the premises, Nos. 38, 39, and 40 Lower Gardiner Street. Defendant had let No. 40 to the plaintiffs under a contract of tenancy whereby she was bound to execute necessary repairs. During the recent disturbances in Dublin all three houses were damaged, and the plaintiffs as a consequence had to expend the sum of £73 1s. upon necessary repairs to the house occupied by them (No. 40), and they alleged that a further sum of £48 10s. would have to be expended upon it for repairs. Defendant lodged a claim for compensation for the damage occasioned to her three houses, and was awarded a lump sum of £1,000 as compensation for the three.

Plaintiffs instituted proceedings in the High Court claiming (1) a declaration that the defendant was a trustee for the plaintiffs of the said sum of £73 1s. (2) Payment by the defendant of the said sum of £73 1s. with interest thereon at the rate of 4 per cent. per annum from the date of payment to the defendant of the said sum of £1,000. (3) In the alternative, payment by the defendant of the sum of £73 1s., money received by the defendant for the use of the plaintiffs. (4) In the further alternative, payment by the defendant of the sum of £73 1s., money paid by the plaintiffs for the defendant at her request. (5) A declaration that the defendant was bound to expend the said sum of £48 10s. upon repairs to the house, No. 40 Lower Gardiner Street. (6) In the alternative, damages for breach by the defendant of her agreement to expend the said sum of £48 10s. upon such repairs. (7) In the further alternative, damages for breach by the defendant of her agreement to repair and keep in repair the said house. (8) A declaration that the said sums of £73 1s. and £48 10s. with interest as aforesaid were well charged in favour of the plaintiffs upon the interest of the defendant in the said houses, Nos. 38, 39, and 40 Lower Gardiner Street. (9) That such charge might be enforced by a sale, or a receiver, or both, as the Court might direct. (10), (11), and (12) Necessary accounts and inquiries, further relief, and costs.

The defendant applied to Meredith J. to have the action transferred to the Circuit Court under sect. 25 of the Courts of Justice Act, 1924 (No. 10 of 1924). The plaintiffs resisted the application on the ground that there was no procedure in existence whereby the action "might have been commenced in the Circuit Court" as required by that section. And that although the jurisdiction of the Circuit Court was much wider than that of the former County Court, no Rules or Forms had been prescribed as provided by sect. 66 of the Courts of Justice Act, 1924, enabling litigants to avail themselves of the extended jurisdiction, consequently the procedure was still that of the former County Court, under which this action could not be brought, having

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regard to the relief claimed by the plaintiffs. Meredith J. refused the application, and from his order the defendant appealed to the Supreme Court.

Martin Maguire, for the appellant:—

Appellant is entitled to have the action transferred to the Circuit Court under sect. 25 of the Courts of Justice Act, 1924 (No. 10 of 1924). Jurisdiction conferred by statute on a Court cannot be ousted by the absence of Rules and Forms for procedure; the Court itself will, in such cases, provide a convenient Form. Assuming that plaintiffs were entitled to a charge, the charge would only be upon the interest of the defendant in the premises No. 40 Lower Gardiner Street, and not upon all three houses. The equitable relief sought was only inserted with the object of defeating an application to transfer the action to the Circuit Court. It would be a great hardship on the appellant to be put to the expense of High Court proceedings when the Circuit Court has jurisdiction, and is the proper forum.

C. Murphy, for respondents:—

The procedure in the Circuit Court remains the same as in the former County Court in the absence of new Rules of procedure. Till the new Rules and Forms are prescribed the Circuit Court cannot exercise its full jurisdiction under sect. 48 of the Courts of Justice Act, 1924, and this more especially as there cannot, under the existing procedure, be a joinder of a claim for equitable relief with a common law claim. Under the covenant to repair, the plaintiffs were entitled to a charge on all three houses, but the Poor Law Valuation of the three exceeds £60, and is, therefore, beyond the jurisdiction of the Circuit Court as prescribed by sect. 48.

Cur. adv. vult.

April 18.

The judgment of the Court was delivered by FitzGibbon J.:

The defendant is the owner of three houses in Lower Gardiner Street in the City of Dublin. The plaintiffs are in occupation of one of these houses as tenants from year to year to the defendant.

During the late disturbances all three houses appear to have suffered damage, and the plaintiffs allege that they expended a sum of £73 1s. upon necessary repairs to the house of which they were in occupation—repairs which they allege that the defendant was bound by the contract of tenancy to execute for them.

The defendant lodged a claim for compensation in respect of the damage sustained by all her houses, and the plaintiffs allege that in the course of negotiations regarding this claim between the claimant and the representatives of the Minister

for Finance it was admitted that the sum of £73 1s. had been expended by the plaintiffs, and that a further sum of £48 10s. would have to be expended upon the house which was in their occupation. It is stated that an award of £1,000 was made in the defendant's favour, to cover all claims for damage to her property, and it is alleged that she has received this amount from the Minister for Finance.

The plaintiffs instituted these proceedings in the High Court, claiming (1) a declaration that the defendant is a trustee for the plaintiffs of the said sum of £73 1s. (2) Payment by the defendant of the said sum of £73 1s., with interest thereon at the rate of 4 per cent. per annum from the date of payment to her of the said sum of £1,000. (3) In the alternative, payment by the defendant of the sum of £73 1s., money received by the defendant for the use of the plaintiffs. (4) In the further alternative, payment by the defendant of the sum of £73 1s., money paid by the plaintiffs for the defendant at her request. (5) A declaration that the defendant is bound to expend the said sum of £48 10s. upon repairs to the house, No. 40 Lower Gardiner Street. (6) In the alternative, damages for breach by the defendant of her agreement to expend the said sum of £48 10s. upon such repairs. (7) In the further alternative, damages for breach by the defendant of her agreement to repair and to keep in repair the said house, No. 40 Lower Gardiner Street. (8) A declaration that the said sums of £73 1s. and £48 10s. with interest as aforesaid are well charged in favour of the plaintiffs upon the interest of the defendant in the said houses, Nos. 38, 39, and 40 Lower Gardiner Street. (9) That such charge may be enforced by a sale, or a receiver, or both, as the Court may direct. (10), (11), and (12) Necessary accounts and inquiries, further relief, and costs.

The valuation of the plaintiffs' house, No. 40 Lower Gardiner Street, is £37, that of the three houses, 38, 39, and 40, is over £100.

By sect. 48 (iii) of the Courts of Justice Act the jurisdiction of the Circuit Court in civil cases involving title to land is limited to those cases wherein the Poor Law Valuation of the property in question does not exceed £60.

The defendant applied to Meredith J. for an order transferring the action to the Circuit Court Judge for Dublin, within whose jurisdiction all the parties reside, and the property itself is situate.

The plaintiffs opposed the application, alleging as grounds that the action could not have been brought in the Circuit Court having regard to the existing procedure, and also by reason of the valuation of the defendant's houses exceeding £60; and, in addition, they submitted that there was a great quantity of business pending in the Dublin Circuit Court, and that delay might take place before a trial could be had.

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FitzGibbon J.

The learned Judge made no rule on the defendant's application, apparently upon the ground that the action was one which could not have been commenced in the Circuit Court, and this ground was the one which was most strenuously argued before us.

It is true that at the date when this action was commenced, and possibly at the present time, no rules had been made regulating procedure in the Circuit Court, and business in that Court is being conducted under and by means of the Rules and Forms which were in use in the old County Courts, and those Rules and Forms do not admit of the joinder of claims for equitable relief of the nature sought in this action with common law claims for damages and upon the common money counts.

It is quite clear that an action claiming the relief sought by the plaintiffs could not have been commenced in, or remitted to one of the old County Courts, but it is equally clear that, subject to one objection, it is completely within the jurisdiction of the new Circuit Court.

If so, it can be transferred to the Circuit Court, if in the discretion of the High Court, or in the discretion of this Court on appeal from the High Court, the action is one which is not fit to be prosecuted in the High Court: provided it is an action "which might have been commenced in the Circuit Court."

It has been urged that this action, even though it is within the statutory jurisdiction of the Circuit Court, could not have been commenced in that Court because there were at the date when it was commenced no Rules or Forms which would have enabled the plaintiff to commence it there.

In our opinion the section of the Courts of Justice Act, which deals with the transfer of civil actions from the High Court to the Circuit Court, is concerned with jurisdiction and not with Forms, and the question whether an action might, or might not have been commenced in the Circuit or District Court depends upon the jurisdiction of those Courts to entertain it.

If the statute has conferred jurisdiction upon either of these Courts to entertain a case, the Court cannot be deprived of that jurisdiction by the non-existence of Rules of procedure or Forms.

This principle scarcely requires authority; but authority may be found in the case of *Tevlin* v. *Lisnaskea Rural District Council* (1) (overruled later on an entirely different point) where it was emphatically stated by the Lord Chief Baron; and in *Canning* v. *Farren* (2) Lord O'Brien, delivering the joint judgment of the majority of the Court, consisting of himself, the Lord Chief Baron, and Andrews, Madden, and Boyd JJ., for which he stated: "Each member of that majority

(1) [1914] 2 I. R. 15, at p. 24. (2) [1907] 2 I. R. 486.

is responsible, not alone for the result, but for each step of the reasoning which has led to it," formulated their conclusion in these words, which are remarkably appropriate to the present case: "When jurisdiction exists in a case in which apt procedure is not provided by statute, the Judge must himself mould a convenient form of procedure" (1).

For us it adds little to the authority of that pronouncement that it was quoted with approval and followed by Sankey J. in *Smith* v. *Williams* (2) in the English King's Bench Division. The same principle was acted upon by the Privy Council in *Attorney-General for Ontario* v. *Daly* (3) last year.

It is true that the absence of Rules or Forms is an obstacle in the way of litigants which may justify them in commencing in the High Court proceedings which might more properly be tried in the Circuit Court, but this cannot deprive the High Court or this Court of the power to transfer, or the Circuit Court of the power and duty to hear a case which the Circuit Court has jurisdiction to entertain and which is not fit to be prosecuted in the High Court.

In our opinion, having regard to the amount involved, the circumstances of the parties, the legal questions raised, and the nature of the claim, dealing as it does with the ultimate distribution of a fund already awarded by the Circuit Court Judge of Dublin as compensation for damage sustained by the very property to which this action relates, the same Court is a peculiarly appropriate tribunal for the trial of these proceedings.

One objection which has been taken to the transfer remains to be dealt with.

Part of the equitable relief sought is a charging order upon the defendant's interest in all three houses, and the Poor Law Valuation exceeds the limits of the jurisdiction of the Circuit Court.

This claim appears to us to be wholly unsustainable, even upon the allegations of the plaintiffs themselves, and it must have been inserted either through inadvertence or with the express object of defeating an application to transfer the action to the Circuit Court.

Following the former practice in similar cases under the Common Law Procedure Act of 1870, as evidenced by such decisions as *Courtenay* v. *M'Donnell* (4), *Cox* v. *Dalton* (5), and *Clarke* v. *Doherty* (6), we shall order that the claim for a charging order, sale, and receiver be struck out so far as it relates to the houses numbered 38 and 39 Lower Gardiner Street, and that the action, subject to this amendment, be transferred to the Circuit Court of the City of Dublin to proceed therein

(1) [1907] 2 I. R., at p. 501.
(2) [1922] 1 K. B. 158.
(3) [1924] A. C. 1011.
(4) I. R. 6 C. L. 35.
(5) 12 L. R. Ir. 420.
(6) 32 Ir. L. T. R. 43.

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as to justice shall appertain, and that the costs already incurred shall abide the result of the action.

Solicitors for the appellant: *Vincent & Beatty.*
Solicitor for the respondents: *Wm. Kerr Johnston.*

R. L. S.

[*Note.*—With reference to so much of the decision in *Tevlin* v. *Lisnaskea Rural District Council,* [1914] 2 I.R. 15, as was not over-ruled by *M'Daid* v. *Milford Rural District Council,* [1919] 2 I.R. 1, and which dealt with the point that no regulations had been made pursuant to sect. 29 of 6 Ed. 7, c. 37, the question came before the House of Lords in *Marron* v. *Cootehill (No. 2) Rural District Council,* [1915] A.C. 792; [1915] 1 I.R. 216; and Lord Atkinson expressly referred to *Tevlin* v. *Lisnaskea Rural District Council,* and stated that he considered that the view there laid down on this point was "very questionable." He, however, refrained from expressing a definite opinion on the point (as did the majority of the other members of the House of Lords), as they held that, even assuming that the regulations had been made, the plaintiff's action failed on other grounds: as Lord Parmoor said "it was unnecessary to express an opinion whether, in the absence of regulations, the action was competent." Lord Sumner held that the defendants must be deemed, in the plaintiff's favour, to have made the regulations.

Courtenay v. *M'Donnell,* Ir. R., 6 C.L. 35, was disapproved of in *Brown* v. *Carroll,* 4 L.R.Ir. 144, by Dowse B.—ED.]

JOHN MOORE, PLAINTIFF, *v.* BERNARD O'REILLY, DEFENDANT (1).

Supreme Court. 1925.

March 31.

Practice—Transfer of action—Action commenced in High Court—Transfer to Circuit Court—Writ issued before the establishment of Circuit Courts—Action for specific performance—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *sect.* 36—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 17, 21, 25, *and* 51.

The Courts of Justice Act, 1924, sect. 25, provides:—"When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may . . . apply to the High Court that the action be remitted or transferred to the Circuit Court . . ."

The defendant in an action for specific performance applied to have the action transferred to the Circuit Court. At the time when the writ was issued the Circuit Court had not been established in that part of the Irish Free State to which it was sought to have the action transferred.

Held, that the action could not be transferred under sect. 25 of the Courts of Justice Act, 1924, because the action could not have been commenced in the Circuit Court at the time when it was commenced, since the Circuit Court was not then established.

M'Collum v. *Tease,* [1925] 2 I.R. 33, applied.

Decision of Meredith J., [1925] 1 I.R. 54, affirmed.

APPEAL from an order made by Meredith J. refusing a motion by the defendant to transfer to the Circuit Court at Cavan, an action begun in the High Court, for the specific performance of an agreement for the sale of a farm in the County of Cavan. The decision of Meredith J. is reported *ante,* p. 54. From that decision the defendant appealed.

At the time of the issue of the writ the Circuit Court had not been established in that part of the Irish Free State to which it was sought to have the action transferred.

Geoghegan for the appellant:—*M'Collum* v. *Tease* (2) was an application to transfer under sect. 25 of the Courts of Justice Act (No. 10 of 1924) a common law action for damages for assault. An application to remit that action, if it had been made under sect. 6 of the Common Law Procedure Amendment Act (Ireland), 1870 (33 & 34 Vict. c. 109), within the eight days' limit, would, it is submitted, have been successful. This application is distinguishable, as the action is for specific performance. The High Court had power to remit this action under sect. 36 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), because sects. 17 and 21 of the Courts of Justice Act, 1924, transferred to the present High Court the jurisdiction

(1) In the Supreme Court, before KENNEDY C.J. and O'CONNOR and FITZGIBBON JJ.

(2) [1925] 2 I. R. 33.

Supreme Court. 1925.

MOORE v. O'REILLY.

exercised by the former High Court, and by sect. 51 of the latter Act the jurisdiction which was vested in the County Court became vested in the Circuit Court. The jurisdiction given to transfer by sect. 25 of the Courts of Justice Act, 1924, is in addition to, and not in substitution for, the jurisdiction given by sect. 36 of the Act of 1877.

T. J. Smyth for the respondent:—The application is governed by *M'Collum* v. *Tease* (1).

KENNEDY C.J.:—

I am of opinion this application is ruled by *M'Collum* v. *Tease* (1), and see no reason to differ from the views there expressed. The Circuit Court was not established on the date the writ was issued, and the action could not on that date have been commenced in the Circuit Court. Jurisdiction to transfer does not exist. The appeal must be dismissed with costs.

O'CONNOR J.: I agree.

FITZGIBBON J.: I agree.

Solicitor for applicant: *George V. Moloney.*
Solicitors for respondent: *W. J. Feegan & Co.*

R. L. S.

(1) [1925] 2 I. R. 33.

JAMES SHORT, PLAINTIFF; ELLEN LAMBE AND THE HIBERNIAN BANK, LTD., DEFENDANTS (1).

(1924. No. 282.)

Supreme Court.
1925.
March 5.

Practice — Particulars — Executor's action — Claim for general account — Agency—Order 19, rule 7.

An executor brought an action against E. L. and a Bank, claiming an account of certain moneys which, he alleged, were assets of the testator. The statement of claim stated that for some years prior to the death of the testator, E. L., who was his daughter, was entrusted by him with the general management and control of his money, and that certain moneys of his were from time to time placed on deposit account in the defendant Bank in the joint names of the testator and E. L., and also in the name of E. L. alone. Specific sums were then stated to have been so placed on deposit, and the deposit receipts were stated to have been cashed by E. L., and the money placed on deposit account in her own name. E. L. served notice on the plaintiff to furnish particulars of the sums lodged in the Bank other than those specifically mentioned in the statement of claim, with dates of lodgment, to which the plaintiff replied that the sums and dates of lodgment were within the knowledge of E. L., and, without prejudice to claims for further sums, referred to certain specified amounts. E. L. then applied for an order to compel the plaintiff to furnish particulars.

Held, reversing Murnaghan J., that the action being substantially one claiming a general account, in reality on the basis of agency, the defendant E. L. was not entitled to particulars.

APPEAL from an order made by Murnaghan J., dated February 12th, 1925, whereby the plaintiff was ordered to give to the defendant, Ellen Lambe, further and better particulars of sums of money referred to in paragraphs 2 and 6 of the statement of claim.

The plaintiff, James Short, was the executor of the will of Patrick Agnew, late of Courtbane, County Louth, who died on February 17th, 1924. Probate was granted to the plaintiff on April 15th, 1924; and he then instituted an action against the defendants, claiming an account of certain moneys which, he alleged, were assets of the testator, and, if necessary, administration of the personal estate of the testator. The defendant, Ellen Lambe, was one of the children of the testator.

The material parts of the statement of claim were:—

"2. For some years prior to the death of the said Patrick Agnew, deceased, the defendant, Ellen Lambe, was entrusted by the said deceased with the general management and control of the moneys of the said deceased, and certain moneys, the property of the said deceased, were from time to time placed on deposit account in the Crossmaglen branch of the bank of

(1) Before KENNEDY C.J. and O'CONNOR and FITZGIBBON JJ.

Supreme Court. 1925.

SHORT v. LAMBE.

the defendants, the Hibernian Bank, Ltd., in the joint names of the deceased and the said Ellen Lambe, and also in the name of the said Ellen Lambe alone.

"3. On the 24th day of August, 1923, the sum of £500, the property of the said deceased, was placed on deposit account in the said branch of the said bank in the joint names of the said deceased and the defendant, Ellen Lambe, and so remained up to and after the death of the said deceased.

"4. On the 14th of March, 1924, the defendant, Ellen Lambe, cashed the deposit receipt for the said sum of £500, and, to the best of the plaintiff's information and belief, lodged said sum with the defendants, the Hibernian Bank, Ltd., on deposit account in her own name, where the said sum still remains.

"5. On the 2nd day of January, 1923, the said deceased lodged on deposit account with the defendants, the Hibernian Bank, Ltd., at their said branch, the sum of £194 4s. 4d. in his own name. On the 7th day of November, 1923, the defendant, Ellen Lambe, cashed the deposit receipt for the said sum, and, to the best of the plaintiff's information and belief, lodged said sum with the defendants, the Hibernian Bank, Ltd., on deposit account in her own name, where the said sum still remains.

"6. The said sums referred to in paragraphs 3, 4, and 5 hereof, and the other sums referred to in paragraph 2 hereof, of which the plaintiff has not particulars, were the proper moneys of the said deceased, and were entrusted to the defendant, Ellen Lambe, to be held by her in trust for and for the use of the said deceased."

In paragraph 8 the plaintiff claimed, *inter alia*, an account against the defendant, Ellen Lambe, of all moneys received by her from or for the use of the deceased or upon trust for the deceased, and payment to the plaintiff of the amount found due on the taking of the account.

The solicitor for the defendant, Ellen Lambe, served notice on the plaintiff's solicitors, asking them to furnish particulars of the following matters alleged in paragraphs 2 and 6 of the statement of claim:—

> "The sums of money lodged in bank other than those specifically mentioned in paragraphs 3, 4, and 5 of the statement of claim, including the respective dates of the lodgment and the respective amounts."

The plaintiff's solicitors replied that the sums of money referred to and the dates of lodgment were all within the knowledge of the defendant, Ellen Lambe, and full particulars were not yet within the plaintiff's knowledge. Without prejudice to claims in respect of further sums, the plaintiff referred specifically to the following:—

(*a*) £100 lodged on deposit account in the joint names of deceased and Ellen Lambe on October 15th, 1921.

(*b*) £102 13s. 6d. lodged on deposit account in the joint names of deceased and Ellen Lambe on October 15th, 1921.

(*c*) Subsequent relodgments of the said sums, with interest and added moneys.

(*d*) Proceeds of crop and stock received by Ellen Lambe.

The defendant, Ellen Lambe, then applied to Murnaghan J. for an order that the plaintiff do furnish the particulars asked for in the notice which had been served upon the plaintiff. Murnaghan J. granted the order, and from that order the plaintiff appealed.

Overend K.C. and *Lavery,* for the appellant:—

In an action for a general account, such as this is, the plaintiff should not be ordered to furnish particulars.

Jellett K.C. and *Geoghegan,* for the respondent, Ellen Lambe:—

It is only where the action is for a general account *simpliciter* that an application for particulars will be refused. But where specific sums are claimed, as here, the fact that a general account is also claimed does not disentitle the defendant to particulars: *Blackie* v. *Osmaston* (1); *Kemp* v. *Goldberg* (2).

Overend K.C., in reply:—

Where an equitable claim for an amount to be ascertained by an account is made, the plaintiff will not be ordered to furnish particulars: *Augustinus* v. *Nerinckx* (3).

KENNEDY C.J.:—

We are all of opinion that the order made by Murnaghan J. should be reversed. Substantially, what the plaintiff claims in this case is a general account. If, in reality, the action is one claiming a general account, on the basis of agency, then the defendant is not entitled to particulars.

Although I am satisfied that the defendant, Ellen Lambe, is not entitled to particulars, still I think the statement of claim was not framed in a way to make it clear to the defendant that she had to answer for more than specific sums lodged on deposit account.

The order of Murnaghan J. must be discharged, costs to be costs in the cause.

O'CONNOR and FITZGIBBON JJ. concurred.

Solicitors for the appellant: *Corr & O'Connor.*
Solicitor for the respondent, Ellen Lambe: *Michael Hearty.*

C. L.

(1) 28 Ch. Div. 119. (2) 36 Ch. Div. 505. (3) 16 Ch. Div. 13.

Wylie J.
1925.

April 21.

BALFOUR, LANDLORD; MURTAGH, TENANT.

Landlord and tenant — Land purchase — Calculation of purchase price — Judicial rent abated by agreement—Agreement not filed in Land Commission — Status of tenant, judicial or non-judicial — Land Act, 1923 (No. 42 of 1923), sect. 22 (3), and Schedule I, Parts 1 and 2.

By an agreement between a judicial tenant and his landlord, the judicial rent was reduced. The agreement was not filed in the Land Commission. The tenant continued to pay the reduced rent under this agreement.

Held, that although the agreement was not filed, the rent continued to be a judicial rent, and that the purchase price under the Land Act, 1923 (No. 42 of 1923), was to be calculated on the basis of the reduced rent in accordance with Part I of the First Schedule to the Act.

APPEAL by the landlord from an order of the Land Commission disallowing the objection of the landlord to the provisional list of particulars published by the Land Commission, in which the tenant's holding was returned as being subject to a rent other than a judicial rent.

It was admitted that in the year 1882, by agreement filed in the Land Commission, a fair rent of £128 was fixed on the holding, and that in the year 1897 the rent was reduced to £108 by agreement, but that this latter agreement was never filed.

The agent was examined and the rentals produced.

Newett, for the landlord:—First, I rely on s. 3 (1) of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), under which a statutory term can only be ended in one of two ways, neither of which has been followed. The true view is that the holding continued to be subject to the judicial rent, but the landlord agreed to accept a portion of it. Secondly, it is true the agreement reducing the rent was never filed. But the tenant went into possession, the doctrine of part performance applies, and equity considers that done which ought to have been done.

Geoghegan, for the tenant:—This is not a judicial rent: see the definition of "judicial rent" in s. 48 of the Land Law (Ireland) Act, 1896, and the statutory rules thereunder. To make this agreed rent a judicial rent, the agreement should have been duly filed. Equitable doctrines are displaced by the express words of a statute.

WYLIE J.:—I have full power under section 22 (3) of the Act of 1923 to decide the meaning and effect of the agreement of 1897. I think it is quite clear on the facts proved before me that the parties meant that henceforth the rent should be £108, but that all the other conditions of the tenancy should remain unchanged. In order to carry out that agreement effectually it should have been filed. It was not in fact filed, but in equity it must be regarded as having been filed. The tenant had no intention of abandoning his status of present tenant, and the fact that the agreement was never filed cannot defeat the intention of the parties in this respect.

I allow the appeal with costs, measured at five guineas.

Solicitors for the landlord: *Stanuell & Son.*
Solicitor for the tenant: *John J. Macken.*

T. C. T.

Murnaghan J.
1925.
Mar. 10, 13.

Supreme Court.
1925.
May 13, 14.

In the MATTER of the ESTATE of the REV. CHARLES J. MALONE, deceased; MALONE *v.* MALONE.

(1925. No. 2367.)

Will—Construction—Bequest of "books, furniture, and effects of every kind of which I may die possessed" — Second residuary clause — Whether money on deposit receipt captured by "effects"—Meaning of "effects" —Exclusion of ejusdem generis rule.

Testator's will, after certain legacies, proceeded: "I direct my executors, as soon after my death as they conveniently can, to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed, and to hand over the proceeds of such sale, after payment of my just debts and funeral and testamentary expenses," to his brother T. S. M., to be applied by him in the same way and for the like purposes as a previous bequest in the will. Testator, at the end of his will, appointed his brother T. S. M. his residuary legatee.

Held by the Supreme Court, affirming Murnaghan J., that the word "effects" carried a sum of money standing on deposit receipt in bank in testator's name at the date of his death.

Summons.

Charles J. Malone, a Roman Catholic clergyman, by his will, dated the 10th day of May, 1881, after revoking former wills, bequeathed a sum of £70 to his brother, Thomas Stradford Malone, to be held by him for the joint benefit of himself, the testator's parents, and such of the testator's brothers and sisters as should be living at his death, in equal shares. Testator then gave to the Rev. Robert Eaton a sum of £5, to be applied by him in the celebration of Masses for the repose of testator's soul, and a similar sum to two other clergymen, to be applied by them in a similar manner. After certain other small bequests, and directions as to his place of burial, the will continued:—"I direct my executors, hereinafter named, as soon after my death as they conveniently can, to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed, and to hand over the proceeds of such sale, after payment of my just debts and funeral and testamentary expenses, to my said brother, Thomas Stradford Malone, to be applied by him in the same way and for the like purposes as the said sum of £70 hereinbefore bequeathed to him is to be applicable." Testator then appointed the Rev. Robert Eaton and his said brother, Thomas Stradford Malone, executors of his will, and he appointed the said Thomas Stradford Malone his residuary legatee. Testator died on the 18th day of November, 1924, and amongst his assets was a sum of £4,309 11s. 7d., standing in his name on deposit receipt in the Munster and Leinster Bank.

The summons was to determine whether, on the true construction of the will, the said sum of £4,309 11s. 7d. standing on deposit receipt in the name of the deceased in the Munster and Leinster Bank, Ltd., passed (*a*) under the description of "books, furniture, and effects of every kind"; or (*b*) under the residuary clause.

Tobias, for the plaintiff:—Testator's direction to his executors was: "to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed." The words, "effects of every kind of which I may die possessed," would include the money on deposit receipt. The word "effects" is not limited by the *ejusdem generis* rule, and, taken with the words that follow, must be given a wide interpretation: *Mitchell* v. *Mitchell* (1); *Hogan* v. *Jackson* (2); *Fleming* v. *Burrows* (3); *Bennett* v. *Batchelor* (4); *In the Goods of Shepheard* (5); *Kendall* v. *Kendall* (6). The direction to sell and convert cannot restrict the meaning of the word "effects": *Hearne* v. *Wigginton* (7). The rule is "to give to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense": Jarman, 6th ed., vol. i, p. 1029. [He also referred to *Parker* v. *Marchant* (8).]

M. Maguire, for the defendant:—The money on deposit receipt is not covered by the gift of "my books, furniture, and effects of every kind of which I may die possessed." The word "effects" has not the unrestricted meaning contended for, but is limited by the *ejusdem generis* rule, being preceded by the words, "my books, furniture," and must be limited to property of a similar character: *Campbell* v. *M'Grain* (9); *Watson* v. *Arundel* (10); *Re Miller, Daniel* v. *Daniel* (11); *Re Hammersley, Heasman* v. *Hammersley* (12). The meaning might be more extended if it occurred in a residuary clause, but here it occurs in the body of the will. In the cases that have been cited for the plaintiff there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. But here a residuary legatee has been appointed, which supports a restricted construction: Jarman, 6th ed., vol. i, p. 1032.

Cur. adv. vult.

MURNAGHAN J.:—

The question of construction submitted to the Court in the present case is whether a sum of £4,309 11s. 7d., standing on

(1) 5 Madd. 69.
(2) Cowp. 299.
(3) 1 Russ. 276.
(4) 1 Ves. Jun. 68.
(5) 48 L. J. Pr. 62.
(6) 4 Russ. 360.
(7) 6 Madd. 119.
(8) 1 Y. & C.C.C. 290.
(9) Ir. R. 9 Eq. 397.
(10) Ir. R. 10 Eq. 299.
(11) 61 L. T. 365.
(12) 81 L. T. 150.

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deposit receipt in bank in the name of the testator, passes under a bequest of books, furniture, and effects of every kind of which he might die possessed, or whether the same passes under the residuary clause in the will.

The will in question is that of Rev. Canon Malone (who died at an advanced age on the 18th November, 1924), and was made forty-three years previously, viz., on 10th May, 1881. The will was witnessed by a solicitor and by a solicitor's clerk, and was apparently prepared with legal assistance; there is nothing which can be relied upon as indicating the intention of the testator save the words of the will itself, the material portions of which are as follows:—"In reference to a sum of about seventy pounds belonging to me and at present in the hands of my brother, Thomas Stradford Malone, I give, devise, and bequeath same to my said brother, to be held by him for the joint benefit of himself, my parents, and such of my brothers and sisters as may be living at my decease in equal shares." The will, after dealing with small bequests for Masses for the repose of testator's soul, a small specific bequest, and directions as to burial, continues:—"I direct my executors, hereinafter named, as soon after my death as they conveniently can, to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed, and to hand over the proceeds of such sale, after payment of my just debts and funeral and testamentary expenses, to my said brother, Thomas Stradford Malone, to be applied by him in the same way and for the like purposes as the said sum of seventy pounds hereinbefore bequeathed to him is to be applicable. I nominate, constitute, and appoint the Rev. Robert Eaton and my said brother, Thomas Stradford Malone, executors of this my will, and I appoint the said Thomas Stradford Malone my residuary legatee."

The answer to the question submitted for the decision of the Court depends entirely upon the intention of the testator, but this intention must not be ascertained by speculation as to what the testator may have desired—a method which would in any event lead to results vague and uncertain—but must be gathered from the expressions used by the testator in his will. The interpretation of these expressions depends ultimately upon principles which, whether consciously employed or not, can be formally stated; in fact, the decisions of the Courts upon language contained in previous wills, many of which have been cited during the argument, are of no value in aiding the construction of the particular will in question, but are valuable as suggesting the principles which should be applied.

In the first place, it has been frequently determined that the meaning of the word "effects" is comprehensive and sufficient *prima facie* to pass all the testator's personal estate: *Campbell* v. *M'Grain* (1). The same word may, however, be used by a

(1) Ir. R. 9 Eq. 397, at p. 399.

testator in a limited sense, and the inference that the word is to be used in a limited sense may be gathered from the language used by the testator in his will. It frequently happens that in wills an enumeration of particulars is followed by the word "effects," and the enumeration is preceded by some descriptive word, such as "household," which may be taken to qualify the whole, and limit the entire description to some particular property; or the entire enumeration may be qualified by a reference to locality: in these cases there is no difficulty in attaching to the word "effects" a more limited meaning. On the other hand, as pointed out by Page-Wood V.-C. in *Gibbs* v. *Lawrence* (1), where an enumeration of particulars is followed by general words and there is no residuary gift, the tendency of the Court is to give general words the widest operation so as to avoid an intestacy.

In the present case the words are not accompanied by any qualifying epithet, nor is there any limitation by reference to a particular locality. The main argument for placing a limited construction upon the word "effects" is that it follows the words, "books, furniture." Is there, then, in this case such an enumeration of particulars preceding the words "and effects" as to show that these words are restricted to articles *ejusdem generis*? Cases may be referred to, such as *Swinfen* v. *Swinfen* (*No. 4*) (2)—a gift of furniture and "other movable goods"—and *Arnold* v. *Arnold* (3)—"a gift of my wines and property in England"—where the general word preceded by one particular has not been considered in any sense to have been restricted. On the other hand, the enumeration of many particulars may lead to restricting the meaning of the general word following. The true principle of distinction has been stated by Brady L.C. in *Mahony* v. *Donovan* (4) to be this, viz. that "when general words are so added, they appear to be used merely for fear that any property of the class of which the testator speaks might have been omitted, and in order that anything so left out of the particular enumeration might pass; but that where the general words are used, the mere addition of a single particular raises no such inference." Applying this principle, can any intention to deal with a particular class of property be gathered from the words, "books, furniture, and effects"? In the case of a clergyman these words, upon a reasonable construction, might be regarded as the furnishings of his abode. This conclusion is, however, merely an inference, and it is necessary to consider the testator's own description of the effects as being of every kind of which he might die possessed. In the face of this declared meaning of the testator, can the limited meaning above mentioned, which is based merely upon inference, stand? I think not. In my opinion, the words, "and effects of every kind of which I may die possessed," include all the testator's

(1) 7 Jur. (N.S.) 137.
(2) 29 Beav. 207.
(3) 2 My. & K. 365.
(4) 14 Ir. Ch. R. 388, at p. 392.

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estate not otherwise disposed of. In *Mitchell* v. *Mitchell* (1) and *Fleming* v. *Burrows* (2) similar words were relied upon in favour of the general as against the limited construction. I should add that, in my opinion, the case of *Hearne* v. *Wigginton* (3), cited by Mr. Tobias, disposes of any suggestion that the direction to sell and convert into money can be relied upon to restrict the general meaning of the word "effects," especially as it is clear that the particular articles mentioned in the clause would require to be sold.

It is necessary to say a word about the clause by which the testator appointed his brother, Thomas Stradford Malone, his residuary legatee. The beneficiaries of the gift of books, furniture, and effects are to be ascertained with reference to the legacy of £70. This legacy was for the joint benefit of Thomas Stradford Malone, testator's father and mother, and of such of his brothers and sisters as should survive him in equal shares. We are not informed as to the circumstances under which the will was made, or whether the testator's brothers were abroad or known to be alive. But, as it has been stated, that, of his brothers and sisters only one brother, William Malone, besides his brother Thomas Stradford Malone, survived him, a tenancy in common in four equal shares was given of the books, furniture, and effects. As it is probable that testator's parents did not survive him, their shares would have lapsed, and two equal fourth shares would be captured by the residuary clause.

R. R.

The defendant appealed to the Supreme Court (4).

M. Maguire K.C. and *Davitt*, for the appellant:—

The word "effects," where it appears, as here, in the body of the will, must be restricted to things *ejusdem generis* as those described by the words preceding it; but where it is found in a residuary clause, it may be given a wider application. Further, the direction "to sell and convert" cannot apply to money on deposit receipt.

[Authorities cited: Theobald on Wills, 7th ed., pp. 205, 206; Williams on Executors, 11th ed., vol. ii, p. 935; Halsbury, vol. xxviii, p. 682; *Campbell* v. *M'Grain* (5); *Hearne* v. *Wigginton* (3); *Roberts* v. *Kuffin* (6); *Arnold* v. *Arnold* (7); *Hutchinson* v. *Rough* (8).]

Dockrell K.C. and *Tobias*, for the respondent, were not called upon.

(1) 5 Madd. 69. (2) 1 Russ. 276. (3) 6 Madd. 119.
(4) Before KENNEDY C.J., and FITZGIBBON and JOHNSTON JJ.
(5) I. R. 9 Eq. 397. (7) 2 My. & K. 365.
(6) 2 Atk. 112. (8) 40 L.T.R. (N.S.) 289.

KENNEDY C.J.:—

In this case we have had an opportunity since the Court rose yesterday of looking into the various authorities cited and of considering the arguments put forward by Mr. Maguire and Mr. Davitt, and as we have formed a definite opinion upon the question submitted to us, we do not find it necessary to call upon counsel for the respondent.

The question for determination arises on the construction of the will of a well-known Dublin clergyman—the late Canon Charles Malone. His will was made as far back as May 10th, 1881, when he was a curate. He died on November 18th, 1924, and his will was proved on January 7th, 1925. The summons has been taken out by one of his surviving brothers, who claims a benefit under the will, and the respondent is the acting executor.

The question for consideration turns upon a clause in the second part of the will, but to understand that clause it is necessary to refer to the first gift in the will. Having made a general revocation of all previous wills, the testator says: "In reference to a sum of about seventy pounds belonging to me, and at present in the hands of my brother, Thomas Stradford Malone, I give, devise, and bequeath same to my said brother, to be held by him for the joint benefit of himself, my parents, and such of my brothers and sisters as may be living at my decease in equal shares." He then gives certain legacies, with which we are not concerned, and proceeds: "I direct my executors hereinafter named, as soon after my death as they conveniently can, to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed, and to hand over the proceeds of such sale, after payment of my just debts and funeral and testamentary expenses, to my said brother, Thomas Stradford Malone, to be applied by him in the same way and for the like purposes as the said sum of seventy pounds hereinbefore bequeathed to him is to be applicable." He appoints Rev. Robert Eaton—who has since died—and the defendant, Thomas Stradford Malone, as executors of his will; and he appoints Thomas Stradford Malone in terms "my residuary legatee."

Now, the net question is whether the word "effects" in the clause I have read carries the residuary estate of the testator, and particularly a sum of £4,309 11s. 7d. standing on deposit receipt in bank at the date of the testator's death. The word "effects" has been the subject of judicial consideration on more than one occasion, and in this country it has been considered by Sir Edward Sullivan M.R. in *Campbell* v. *M'Grain* (1), where, at p. 399, he says: "There is no doubt that the word

(1) I. R. 9 Eq. 397.

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'effects' in relation to personal property is one of the largest and most comprehensive words that can be used."

The fallacy of the argument on behalf of the appellant here is that it proceeds upon the line that the word "effects" is a word which requires to be extended, and not a term of great comprehensiveness, for the cutting down of which some reason must be shown. In my opinion, the onus rests on the appellant, who argues that the word is not sufficient to carry the property in question, to find on the face of the will something which shows an intention on the part of the testator to limit that otherwise most comprehensive term, "effects."

The first argument on behalf of the appellant rests on the doctrine of *ejusdem generis*. It is said that because "effects" is preceded by the words, "books, furniture," the word "effects" must, on the doctrine of *ejusdem generis*, be limited to property of a like character to books and furniture, that is to say, to the household goods that the deceased would have had in his residence at the time of his death. It is true that in some cases, where there has been an exhaustive enumeration preceding a word like "effects," the Courts have thought that the result was to cut it down and limit it to something of the same genus or character as the things enumerated. In other cases the enumeration has been preceded by a qualifying word, such as "household," and in those cases the word "household" has frequently been held to govern the entire clause, so that the word "effects" acquired a limitation from the qualifying prefix "household." In other cases the word "effects" has been cut down by being limited to effects in a particular place or building. Here we have no qualifying prefix, such as "household"; we have no exhaustive enumeration of chattel property preceding the word "effects"; and we have no expression localising "effects"; while, on the contrary, we have the word followed by these words: "of every kind of which I may die possessed," which, in my opinion, do weigh in the scale against the argument used by Mr. Maguire.

The second branch of Mr. Maguire's argument is that a more limited interpretation will be applied to a word like "effects" in the body of a will than when it appears in a residuary clause. That argument begs the question, because the point here is whether or not this clause is itself a residuary clause. The question here is whether the word "effects" carries the residue even though neither the word "residue" nor the adjective "residuary" is used in connection with it. Mr. Maguire and Mr. Davitt rely upon the final clause in the will, in which the testator names Thomas Stradford Malone as his residuary legatee. Now, anyone familiar with wills knows that nothing is commoner than the insertion of the appointment of a residuary legatee at the end, without regard to the fact that the will already contains a disposition of the testator's residuary estate. It is a form of scrupulous over-caution well recognised. In a case to which I

have been referred by FitzGibbon J., he himself raised the question before the late Vice-Chancellor: *Johns* v. *Wilson* (1). In that case the testator's will contained this clause: "All my railway and other shares, stocks, and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, not hereinbefore disposed of, and all securities, bonds, coupons, cash in bank or elsewhere." At the end of his will he appointed an individual his residuary legatee. It was held by the Vice-Chancellor that this second or supplementary residuary clause did not deprive the first clause of its residuary character, although it did not contain the word "residue" or the adjective "residuary." Such second residuary clause may be very useful, as, for instance, where the principal residuary gift is given in shares among persons some of whom may predecease the testator; and he may intend that the lapsed legacies should be captured by the second residuary clause.

I am of opinion that the fact of there being a second residuary clause in no way detracts from the residuary intention of the testator in the first gift, as it appears on the face of the will. Is there anything on the face of this will to corroborate one reading or the other of this clause? One striking fact must be noted. The testator bequeaths his books, furniture, and effects to be sold and disposed of. How? By handing over the proceeds of such sale, after the payment of his debts, funeral and testamentary expenses, to Thomas Stradford Malone, to be by him applied in the same way as the gift of £70. The fact that the testator charged his debts, funeral and testamentary expenses on this particular disposition is conclusive, in the absence of anything to lead us to another conclusion, that this was intended by the testator to be his disposition of his residuary personal estate. If that be not so, then what the testator did was to take out of what, on the appellant's contention, would be but a small gift, the sum necessary to discharge his debts, funeral and testamentary expenses, thus leaving but a mere trifling sum for his parents, practically an illusory gift, and to secure substantial benefit to his brother, Thomas Stradford Malone. Looking at the whole will, I do not think that such was the testator's intention. I think it is clear that the intention of the testator was that the gift of books, furniture, and effects should carry all his residuary personal estate. Therefore, on the interpretation of that particular clause, this appeal fails, and it must be dismissed, with costs against the appellant.

No other question has been raised by the summons, which, however, asks for an administration order; but another question is referred to in the judgment of Murnaghan J., though not in the summons. As it has not been argued, we cannot consider it. We will leave it open to the parties to apply to the Court as they may be advised.

(1) [1900] 1 I. R. 342.

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FITZGIBBON J.: I had prepared notes of a judgment; but, having heard the judgment of the Chief Justice, I think it is unnecessary to add anything.

JOHNSTON J.: I entirely concur.

Solicitors for the appellant: *Corrigan & Corrigan.*
Solicitors for the respondent: *Keating & Keating.*

C. L.

JOHN HOWARD WIGG AND ROBERT OLIVER COCHRANE, PLAINTIFFS, *v.* THE ATTORNEY-GENERAL OF THE IRISH FREE STATE, DEFENDANT (1).

Supreme Court. 1925.

Feb. 19, 20, 25, 26, 27. April 1.

(No. 788 of 1925.)

Compensation—Civil Servants—Retirement in consequence of change of Government in Irish Free State — Pensions — Amount of — Principles of assessment—Compensation on a sliding scale—Inclusion of war bonus — "Cost of living" figure — "Over-riding maximum" — Amount of superannuation not reviewable by the Courts — 4 & 5 Wm. 4, c. 24, sect. 30—22 Vict. c. 26, sect. 2—9 Ed. 7, c. 10, sect. 4—Government of Ireland Act, 1920 (10 & 11 *Geo. 5, c. 67), sects. 54, 55, 56, 57, 58, and 60, Schedules VIII and IX—Articles of Agreement for a Treaty between Great Britain and Ireland, Art. 10—Irish Free State (Agreement) Act,* 1922 (12 *Geo. 5, c. 4), Schedule, Art. 10—Constitution of the Irish Free State (Saorstát Éireann) Act,* 1922 (*No. 1 of* 1922), *sects. 1 and 2, Schedule I, Arts. 76, 77, 78, and 80, Schedule II, Art. 10—Provisional Government (Transfer of Functions) Order,* 1922 (*Stat. R. and O.,* 1922, *No.* 315).

Plaintiffs, who were for many years employed in an established capacity in the Civil Service of the United Kingdom of Great Britain and Ireland, retired in 1923 in consequence of the change of government effected in pursuance of the "Articles of Agreement for a Treaty between Great Britain and Ireland." They brought an action against the Attorney-General of the Irish Free State, seeking a series of declarations claiming: (1) that the compensation awarded to them on their retirement in pursuance of Art. 10 of the said "Articles of Agreement" was not fair compensation, as part thereof was placed on a sliding scale; (2) that bonus was part of the emoluments and salary; (3) that in calculating superannuation allowance a fixed award should be made, and no part of such superannuation should be placed on a sliding scale; and (4) that in the computation of pension in respect of such bonus the same should not be limited by an over-riding maximum.

Held by the Supreme Court (O'Connor and FitzGibbon JJ., Johnston J. dissenting), reversing Meredith J., that it was not intended by the "Articles of Agreement for a Treaty between Great Britain and Ireland" to give to Civil Servants rights of action for the recovery of compensation, and that the plaintiffs' action was unsustainable and ought to have been dismissed.

O'Connor and FitzGibbon JJ. were of opinion (without expressly so deciding, it being unnecessary to do so), and Johnston J. was also of opinion, (1) that the application of the sliding scale to so much of the plaintiffs' pensions as was attributable to the bonus was correct; and (2) that the application of the "over-riding maximum" was also correct.

APPEAL from the judgment of Meredith J.

Plaintiffs, who were for many years in the Civil Service of the United Kingdom of Great Britain and Ireland, retired in consequence of the change of government effected in pursuance of the "Articles of Agreement for a Treaty between Great Britain and Ireland" (hereinafter referred to as "the Treaty"), and which Articles were given the force of law by the Irish Free

(1) In the Supreme Court, before O'CONNOR, FITZGIBBON, and JOHNSTON JJ.

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State (Agreement) Act, 1922 (12 Geo. 5, c. 4), as from the date of the passing of the Act, i.e. the 31st March, 1922. The plaintiffs were awarded pensions and allowances which they alleged were not in accordance with their rights under Art. 10 of the Treaty.

Art. 10 of the Treaty provides that "the Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the [Government of Ireland] Act of 1920 to Judges, officials, members of Police Forces, and other public servants who are discharged by it, or who retire in consequence of the change of government effected in pursuance hereof."

The facts were set out in the Statement of Claim as follows:—

"1. The plaintiffs were for many years prior to the 1st day of April, 1922, persons serving in an established capacity in the Civil Service of the United Kingdom of Great Britain and Ireland.

"2. The plaintiff, John Howard Wigg, was, at the date referred to, Assistant Architect, Office of Public Works, Dublin, and was in receipt of a salary of £430 per annum, together with bonus amounting to £232 3s. (calculated at the cost of living figure, index figure 105), and amounting on the 31st day of March, 1923, to £199 per annum, calculated at the index figure 90. The said John Howard Wigg had, for the purpose of superannuation, completed seventeen years of actual service on the 1st day of April, 1922.

"3. The plaintiff, Robert Oliver Cochrane, was, at the date referred to, a higher Executive Officer, Office of Public Works, Dublin, and was in receipt of a salary of £400 per annum, together with bonus amounting to £221 5s., calculated at the index figure 105, and for the purpose of superannuation had completed twenty-six years of actual service on 1st April, 1922. The said Robert Oliver Cochrane retired on 1st January, 1923, at which date his salary was £415, with bonus of £194 5s. 6d., calculated at the index figure 90.

"4. Under the terms of the Treaty made between Great Britain and the Irish Free State, and confirmed by an Act to confirm the said Treaty, 12 Geo. 5, c. 4, the plaintiffs, on retirement or removal, were entitled to fair compensation on terms not less favourable than those accorded by the Act of 1920, meaning thereby the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67). The said terms were comprised in the Eighth Schedule to said Act, entitled 'Provisions as to compensation of existing Irish Officers.'

"5. The plaintiff, John Howard Wigg, duly served notice of retirement, and retired, as aforesaid, on the 31st day of March, 1923. The plaintiff, Robert Oliver Cochrane, duly served notice of retirement, and retired, as aforesaid, on the 1st day of January, 1923.

"6. The plaintiff, John Howard Wigg, was, on the 21st day of March, 1923, notified by the Office of Public Works that he had been awarded a pension of £200 per annum, together with a supplementary annual allowance in respect of bonus: (*a*) reference figure £103 0s. 9d., (*b*) over-riding maximum £88 6s. 5d.

"7. The plaintiff, Robert Oliver Cochrane, was, on the 6th day of December, 1922, notified by the Ministry of Finance that he had been awarded a pension of £206 5s. per annum, together with a supplementary annual allowance in respect of bonus: (*a*) reference figure £106 5s. 2d., (*b*) over-riding maximum £91 1s. 7d., as well as £585 15s. additional lump sum allowance, and £183 3s. 10d. supplemental additional lump sum allowance.

"8. The said supplementary annual allowance in respect of bonus has not been fixed definitely, but is made dependent upon a sliding scale calculated upon the cost of living. The plaintiffs, and each of them, contend that bonus is part of the emoluments and salary, and that, in calculating the superannuation, a fixed and definite amount should be ascertained, and that no part of said allowance should be dependent upon such or any sliding scale.

"9. The Minister for Finance of the Irish Free State has in the case of the plaintiffs, who at present reside in England, employed as the basis of said sliding scale the cost of living figure derived from prices in England, which is less than the cost of living figure derived from prices in the Irish Free State.

"10. The plaintiff, Robert Oliver Cochrane, received for the quarters ending 31st March, 1923, and 30th June, 1923, supplementary pension at the rate of £80 19s. per annum, based on cost of living figure in England, calculated at index figure of 80 instead of £91 1s. 7d. awarded as cost of living in the Irish Free State, calculated at index figure 90. For the quarter ended 30th September, 1923, the said Robert Oliver Cochrane received his supplementary pension at the rate of £75 18s. a year, calculated at index figure of 75 instead of £86 0s. 5d., which would be the amount calculated at the Irish index figure 85.

"11. The plaintiff John Howard Wigg has been paid in respect of the quarters ending the 30th June, 1923, and 30th September, 1923, supplementary annual allowance, in respect of bonus, £78 10s. 2d., calculated at index figure 80, and £73 12s., calculated at index figure 75, based on cost of living figure in England, instead of £88 6s. 5d., calculated at index figure 90, and £83 8s. 3d., calculated at index figure 85 respectively, based on cost of living figure for supplementary pension in the Irish Free State."

The plaintiffs contended that pension or superannuation rights should be based upon the cost of living figures derived from prices in the Irish Free State, and that the award should be based upon such figures if a sliding scale might be adopted for the purpose of computation of pension.

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And they also contended that, having regard to their respective years of service, the additional annual allowance in respect of bonus had not been calculated according to the rules established under the Superannuation Acts, 1859 to 1914, but had been restricted by the use of an over-riding maximum, which was illegal and without foundation in point of law.

They further contended that the supplementary additional allowance in respect of bonus had not been awarded on the full bonus to which the plaintiffs were respectively entitled, having regard to the facts alleged in the preceding paragraphs of the Statement of Claim.

And they also contended that the said supplementary additional allowance in respect of bonus had been awarded on the basis of 75 per cent., and not upon the bonus actually enjoyed by the plaintiffs respectively; and the plaintiffs contended that such principle of computation was contrary to law, and that the award should be based upon the full bonus.

They claimed (1) a declaration that the compensation awarded to them respectively was not fair compensation, inasmuch as part of the said compensation was put on a sliding scale; (2) a declaration that the bonus was part of the emoluments and salary formerly enjoyed by them, and that, in calculating the superannuation allowance to be paid to them, a fixed award should have been made, and that no part of such allowance should be put on a sliding scale; (3) a declaration that, if any portion of the said allowance might be based on a sliding scale or cost of living figure, the same should be based on the Irish and not on the English cost of living figure irrespective of the residence of the plaintiffs, or either of them; (4) a declaration that, in the computation of pension in respect of such bonus, the same should not be limited by an over-riding maximum, and that such limitation might be declared illegal; (5) a declaration that, for the purpose of compensation and bonus, the 1st day of April, 1922, was the date by reference to which a superannuation allowance or additional allowance should be fixed and not the actual date of retirement; and the plaintiff, Robert Oliver Cochrane, claimed, in addition, (6) a declaration that the supplementary additional allowance in respect of bonus awarded was inadequate and had not been calculated in the proper manner, and that the award of such on 75 per cent. of the amount of bonus was contrary to law, and that the same should have been awarded on the full amount of bonus.

The defendant in his defence admitted the several matters of fact alleged in the Statement of Claim, but he denied that the plaintiffs, or either of them, were entitled on retirement or removal to the alleged, or any compensation, and referred to the provisions of the Treaty and the Acts mentioned in paragraph 4 of the Statement of Claim. Alternatively, the defendant submitted that the provisions of the Treaty and of the said Acts were not enforceable at the suit of the

plaintiffs. In the further alternative, the defendant submitted that the compensation awarded to the plaintiffs respectively, as pleaded in paragraphs 6 and 7 of the Statement of Claim, was the full sum to which the plaintiffs were entitled pursuant to the said Treaty and Acts. The defendant submitted that the bonus paid to the plaintiffs respectively prior to their retirement did not form part of their emoluments and salary within the meaning of the Superannuation Acts. Alternatively, the defendant said that if the bonus paid to plaintiffs formed part of their respective emoluments and salary, the average sum in respect of which the superannuation allowance was granted was fixed by the persons at the heads of the departments in which the plaintiffs respectively served, with the approbation, in the case of the plaintiff, Robert Oliver Cochrane, of the Minister for Finance of the Provisional Government; and in the case of John Howard Wigg, of the Minister for Finance of the Irish Free State, and the defendant relied on the provisions of sect. 28 of 4 & 5 Wm. 4, c. 24, as a defence to the action.

As a further defence, the defendant said that under the Superannuation Acts the Treasury Commissioners were constituted the tribunal to decide the amount (if any) which should be paid as allowances to Civil Servants upon retirement, and such decision was final: 4 & 5 Wm. 4, c. 24, sect. 30; 22 Vict. c. 26, sect. 2; 9 Edw. 7, c. 10, sect. 4. By the Provisional Government (Transfer of Functions) Order, 1922 (1), the functions of the Treasury Commissioners in connection with the administration of the Civil Service in Southern Ireland were transferred to, and became exercisable by the Ministry of Finance of the Provisional Government. By Article 80 of the Constitution of the Irish Free State the Government of the Irish Free State became, and were the successors of the Provisional Government and of the Treasury Commissioners. The allowance awarded to the plaintiff, Robert Oliver Cochrane, was decided by the Ministry of Finance of the Provisional Government and the allowance awarded to the plaintiff, John Howard Wigg, was decided by the Minister for Finance of the Irish Free State in the exercise of the functions aforesaid, and the defendant submitted that such decisions were final and could not be reviewed in this action. The defendant also submitted that the plaintiffs were not, nor was either of them, entitled to the relief claimed in the action or any part thereof.

Meredith J. held: (1) That the moneys paid to the plaintiffs respectively as bonus formed part of the emoluments and salary formerly enjoyed by the plaintiffs, and that in calculating the superannuation allowance to which the plaintiffs were entitled such bonus should be taken into account; (2) that so much of the superannuation allowance as was attributable to such bonus was properly placed upon a sliding scale, but that such sliding scale

(1) Stat. Rules and Orders for 1922, No. 315.

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should be based upon the Irish and not upon the English cost of living figure, irrespective of the present or future residence of the plaintiffs; (3) that in the computation of so much of the said superannuation allowance as was attributable to such bonus there should be no limitation by an over-riding maximum other than that prescribed by the Superannuation Acts, and that any maximum so prescribed should be calculated and adjusted from time to time by reference to the same sliding scale as that employed in calculating so much of the said superannuation allowance as was attributable to bonus, and should vary from time to time accordingly; that for the purpose of compensation and bonus pursuant to the terms of the Treaty and the Government of Ireland Act (10 & 11 Geo. 5, c. 67) and the Act 12 Geo. 5, c. 4, the respective actual dates of the retirement of the plaintiffs were the dates by reference to which a superannuation allowance or additional allowance should be fixed; that the supplementary additional allowance in respect of bonus awarded to the plaintiff, Robert Oliver Cochrane, was inadequate and had not been calculated in the proper manner, and that the award of such to the said plaintiff, Robert Oliver Cochrane, on 75 per cent. of the amount of bonus was contrary to law, and the same should have been awarded on the full amount of bonus at the date of retirement.

From this judgment, dated the 18th day of July, 1924, the defendant appealed to the Supreme Court for an order that the entire of the said judgment be set aside, and that in lieu thereof it be ordered that the action be dismissed as unsustainable in law, or, in the alternative, for an order that so much of the judgment might be set aside as declared:—(1) that the moneys paid to the plaintiffs respectively as bonus formed parts of the emoluments and salary formerly enjoyed by the plaintiffs; (2) that in the computation of so much of the said superannuation allowance as was attributable to such bonus there should be no limitation by over-riding maximum other than that prescribed by the Superannuation Acts, and that any maximum so prescribed should be calculated and adjusted from time to time by reference to the same sliding scale as that allowed in calculating so much of the said superannuation allowance as was attributable to bonus, and should vary from time to time accordingly; and (3) that the supplementary additional allowance in respect of bonus awarded to the plaintiff, Robert Oliver Cochrane, was inadequate, and had not been calculated in the proper manner, and that the award of such on a 75 per cent. of the amount of bonus was contrary to law, and that the same should have been awarded on the full amount of bonus at the date of retirement.

The plaintiffs, by way of cross-appeal, applied that, in respect of such portion of the second declaration in the judgment of Meredith J. whereby it was declared that so much of the superannuation allowance as was attributable to such bonus was

properly placed on a sliding scale, be set aside; and, in the event of the Court setting that portion aside, the plaintiffs would apply to have the rest of the said declaration also set aside, and in lieu thereof that it be declared that the superannuation allowance to which the plaintiffs were declared entitled under the first declaration of the Court should be fixed and not liable to any variation for any cause, and in the event of the Court deciding in favour of the plaintiffs with reference to the second declaration, that the third declaration of the Court be set aside as unnecessary.

Serjeant Hanna K.C. and *Overend K.C.* (with them *Costello*), for the appellants:—

First, rights under the Treaty are not judiciable by the Free State Courts. This is an international matter to be adjusted diplomatically between the signatories: *Rustomjee* v. *The Queen* (1); *Nabob of Arcot* v. *East India Co.* (2); *De Bode* v. *The Queen* (3). International tribunals have frequently been established to adjudicate on rights arising under a Treaty. Such a tribunal was set up under the Treaty of Washington to assess damages caused by the depredations of "*The Alabama.*" No such tribunal was provided under the Treaty, consequently the plaintiffs are thrown back on diplomatic channels.

Secondly, Civil Servants on retirement have no absolute right to any pension or compensation. They were originally servants of the King's household, and held office during the Sovereign's will and pleasure, and were liable to be dismissed at any time without compensation. Compensation depended entirely on the will and honour of the Sovereign: *In re Tufnell* (4); *Yorke* v. *The King* (5). The payment to Civil Servants on retirement is merely a matter of grace, although it has always been the practice of the Treasury to grant pensions according to fixed rules laid down by different statutes. The Superannuation Acts, 1834 to 1914, did no more than give to the Civil Servant a reasonable expectation of a pension. They made provision for the granting of superannuation allowances and fixed scales by which such allowances were to be computed, but nothing in these Acts was to be construed to extend to give any person an absolute right to compensation for services. The Superannuation Act of 1859 (22 Vict. c. 26) allowed the Civil Servant to present a petition to the Treasury for a gratuity or allowance. But the Treasury had an absolute discretion to grant or withhold it, and the decision of the Treasury was final: *Cooper* v. *The Queen* (6); *Shenton* v. *Smith* (7); *Considine* v. *M'Inerney* (8). The whole policy of these Superannuation Acts was to put and continue the Treasury in complete, paramount, and absolute

(1) 2 Q. B. D. 69.
(2) 3 Bro. C. C. 292.
(3) 3 H. L. R. 449.
(4) 3 Ch. D. 164.
(5) [1915] 1 K. B. 852.
(6) 14 Ch. D. 311.
(7) [1895] A. C. 229.
(8) [1916] 2 A. C. 162.

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control of the award and the amount of pension, and the decision arrived at could not be impleaded in the Courts. *Sutton* v. *Attorney-General* (1) is not in point, for in that case an express contract existed. Superannuation under the Acts is entirely free from contractual obligation and is nothing more or less than a bounty of the Treasury.

On the terms specified in the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), provision was made for the retirement of Civil Servants in consequence of the then proposed change of government, but Civil Servants were given no greater rights than those theretofore enjoyed and which they would have possessed had they continued to serve the British Government. A Civil Service Committee was, under that Act, to replace the Treasury, sect. 56, sub-sect. 1, providing that for the purpose of the provisions of the Act with respect to existing officers, there should be established a committee to be called the Civil Service Committee, and by sub-sect. 6 the determination of this Committee on any claim or question which was to be determined by them under the Act relating to existing officers was to be final and conclusive.

By Article 10 of the Treaty the Irish Free State only agreed to pay fair compensation on terms not less favourable than those accorded by the Government of Ireland Act, 1920, to those Civil Servants who were discharged by it or who retired in consequence of the change of Government. Terms not less favourable than those given by the provisions of the Act of 1920 became, therefore, applicable to the circumstances of the plaintiffs' case by Article 10 of the Treaty. The Treaty was given the force of law by the Irish Free State Parliament by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), sect. 2, and this Act also set forth the Constitution of the Irish Free State. By Article 73 of that Constitution the laws in force in the Irish Free State at the date of the coming into operation of the Constitution are to be of full force and effect until the same or any of them are repealed or amended by the Parliament of the Irish Free State. Article 77 provides that every existing officer of the Provisional Government at the date of the coming into operation of the Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State, and shall hold office by a tenure corresponding to his previous tenure. And Article 78 provides that every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Treaty. By the Provisional Government (Transfer of Functions) Order, 1922, the Minister for Finance found himself in the same position as the English Treasury

(1) 39 T. L. R. 294.

would have been in were it not for the creation of the Civil Service Committee. Consequently, there is vested in the Minister for Finance of the Irish Free State all the powers and rights as to superannuation of Civil Servants which were transferred from the British Government and which were formerly vested in the Treasury. And the Minister for Finance consequently became the sole judge as to whether an award should be made, and, if so, the amount of it, it being agreed that the award, if made, should be on terms not less favourable than those which would have been accorded by the Government of Ireland Act, 1920, had it come into force. In assessing fair compensation the bonus paid to the respondents prior to their retirement should not be taken into consideration in computing what award should be made. Bonus should not be considered as part and parcel of salary, and was not pensionable at all. It was a temporary allowance made during the war to meet the increased cost of living and to make the nominal salary equivalent to its former worth. It was simply an adjustment of the salary itself and never became a regular part of the Civil Servant's remuneration. The Treasury Circular of 9th September, 1916, with regard to bonus did not relate to respondents. The Treasury Minute of 20th March, 1922, brought in a sliding scale so that there might be periodic adjustment of salaries to provide for the rise and fall in the price of commodities. This took into consideration the whole bonus. The control by reference to the over-riding maximum was a control legally adopted. The plaintiffs' action is unsustainable, and the Court has no jurisdiction to make the declarations sought.

Jellett K.C. and *Dickie K.C.* (with them *James Henry*), for respondents:—

The rights claimed by the respondents are based entirely on statute law, and although it is true that the obligations were originally derived from Article 10 of the Articles of Agreement for a Treaty between Great Britain and Ireland, those Articles became the statute law of the land. By the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), sect. 1, and by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), sect. 2, these Articles of Agreement were ratified and adopted and became part and parcel of the municipal law of this country. The Constitution was ratified by the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), sect. 1, and by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), sect. 1. Article 78 of the Constitution confirmed these rights. Consequently the Courts of this country can grant relief, and their aid is properly sought. Furthermore, the Articles of Agreement for a Treaty do not constitute an international document; the word "treaty" is not used here in an international sense. Ireland at the time of

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the signing of these Articles was not a Sovereign Power, and a treaty requires Sovereign Powers as contracting parties thereunder. For the position of the British self-governing Dominions, see Hall's International Law, 8th ed., p. 34. The self-governing Dominions of which the Irish Free State is one do not possess international standing apart from the whole of the British Empire. This document called a "treaty" has not the force of a treaty; it was only a tentative document until it became incorporated in the law of the land. Ratification by the Legislature made it law. There is no analogy between the Treaty of 1783 which recognised the independence of the United States of America and the Treaty which gave birth to the Irish Free State.

Sect. 55 of the Government of Ireland Act, 1920, provided the machinery for compensation on retirement of officers, and this was embodied in the Treaty, and that Act was kept in force in so far as was necessary for that purpose. The respondents acquired thereunder certain defined rights. These rights were neither extended nor curtailed by the Superannuation Acts, 1834–1914. The Act of 1920 fixed and defined the amount payable to those seeking compensation. The respondents are entitled to a declaration that the compensation must be calculated in a specific way according to the statutory requirements. The Act of 1920 is the respondents' code, and the fact that it has ceased to apply to any part of the Irish Free State by 13 Geo. 5, Sess. 2, c. 2, sect. 1, makes no difference: *The Queen* v. *Smith* (1).

Sect. 56 of the Government of Ireland Act, 1920, provided for the appointment of a Civil Service Committee. Discretion was therefore given to a particular body, and no provision was made under the Treaty for a substitute for this body. The giving of a discretion to a particular body does not give that discretion to another body if the first does not exist. Article 78 of the Constitution, read with Article 10 of the Treaty, makes no provision for a tribunal. Respondents are admittedly entitled to fair compensation, but who is to be the arbiter of what is fair? The Treaty does not empower any particular individual or body to say what is fair, and under the circumstances the respondents are entitled to ask for a declaration. Should the respondents be entitled to a writ of *certiorari* to quash the determination of the Minister for Finance as to the amounts of the pensions and allowances (as being based on a wrong principle), which it is submitted they are: *R.* (*Wexford County Council*) v. *Local Government Board for Ireland* (2); *Board of Education* v. *Rice* (3), they are entitled to a declaration. Respondents have fulfilled the conditions necessary to entitle them to their rights under the Treaty, but the appellants have not fulfilled their obligations thereunder. When an obligation is created by a statute and no provision made whereby an aggrieved person may enforce its performance, the common law

(1) L.R. 8 Q.B. 146. (2) [1902] 2 I.R. 349. (3) [1911] A.C. 179.

may in general find a mode suited to the particular nature of the case: *Doe, dem., Bishop of Rochester* v. *Bridges* (1), approved by Esher M.R. in *Lamplugh* v. *Norton* (2), and by Halsbury L.C. and by Lord Macnaghten in *Pasmore* v. *Oswaldtwistle Urban District Council* (3). It has been decided that in cases where the interests of the Crown are directly affected the Courts of Chancery will make declarations: *Dyson* v. *Attorney-General* (4); *Eastern Trust Co.* v. *M'Kenzie, Mann, & Co., Ltd.* (5).

The only onus on the respondents is to show that their compensation does not work out to the same advantage as it would have done were the terms of the Act of 1920 complied with. This has been done.

The decision here is not final. The provisions of the Superannuation Acts dealing with the finality of Treasury decisions do not apply. The tendency in modern times is to grant powers to subsidiary tribunals, but the Courts will not allow them to disregard the law: *Eastern Trust Co.* v. *M'Kenzie, Mann, & Co., Ltd.* (5); *Board of Education* v. *Rice* (6).

A Civil Servant's emoluments consisted of a basic salary *plus* a bonus paid on the current cost of living, and that bonus came to be, and now is, a regular part of a Civil Servant's remuneration, and in calculating the superannuation allowance a fixed award should be made, and no part of such allowance placed on a sliding scale, nor should an over-riding maximum be allowed to exercise any control.

Serjt. Hanna K.C., in reply:—As to Treaties and the capacity to contract, see Hall's International Law, 8th ed., p. 380. The provisions of the Government of Ireland Act, 1920, are not incorporated in Article 10 of the Treaty; if it were intended to incorporate them, more apt language would have been used.

Cur. adv. vult.

April 1.

O'CONNOR J.:—The plaintiffs in this action were Civil Servants of the late United Kingdom of Great Britain and Ireland, and they claim to have certain declarations made by the Court as to the terms on which they are entitled to be compensated on their retirement from office in pursuance of the terms of the Treaty made between Great Britain and Ireland and of the Constitution of the Irish Free State. This claim has been met by the contention that the plaintiffs and all other Civil Servants have no rights which are enforceable by action. It is, therefore, necessary to deal with this fundamental question in the first instance.

(1) 1 B. & Ad. 847, at p. 859.
(2) 22 Q. B. D. 452, at p. 456.
(3) [1898] A. C. 387, at pp. 394, 397, and 398.
(4) [1911] 1 K. B. 410, at p. 421.
(5) [1915] A. C. 750.
(6) [1911] A. C. 179.

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We start from the position that Civil Servants of the Crown had not, either by virtue of their tenure of office or under the Superannuation Acts, any rights enforceable in a Court of law. I need only refer to *Yorke* v. *The King* (1) to show that this is now beyond the range of controversy.

Such was the position when the Government of Ireland Act, 1920, was passed. Under that Act provisions were made for the retirement of Civil Servants upon the proposed change in the government of Ireland and for the award of compensation upon such retirement. It seems perfectly clear that the award was to be made under the Superannuation Acts, but with amended scales of compensation. Sect. 55, sub-sect. 2, provides that the Superannuation Acts, 1834 to 1914, shall continue after "the appointed day," subject, however, to the substitution of a Civil Service Committee for the Treasury as the authority for measuring the amount of any allowance or gratuity under the Acts. The meaning of this change is obvious. The claims for compensation would throw a great burden on the Treasury; and in order to give assurance to Civil Servants that their claims would be fairly dealt with, the jurisdiction to determine the amounts was transferred from the Treasury—a department in a sense personally interested—to a Civil Service Committee, composed of members representing all parties. The 56th section of the Act, which provides for the constitution of the Committee, enacts by sub-sect. 6 that the determination of the Committee on any claim or question shall be final and conclusive. In other words, just as under the Superannuation Acts the Treasury was to be the sole arbiter, so under the Act of 1920 the sole arbiter was to be the Civil Service Committee. I can find nothing whatever in the body of the Act of 1920 which suggests an intention on the part of the Legislature to convert a claim which gave no legal right capable of enforcement in a Court of law into a claim giving a right of action. But the plaintiffs rely mainly on the Eighth Schedule to the Act for the purpose of showing that a claim, which under the Superannuation Acts was entirely dependent on the discretion of the Treasury, was converted into a legal right. This conversion, it was urged, was worked by the words in sect. 1, sub-sect. 1, of the Schedule, which are: "He [the retiring Civil Servant] shall be entitled to receive such compensation as the Civil Service Committee may award to him." It was argued that the word "entitled" connotes a right; but to what? Not to anything definite, but to receive such compensation as the Civil Service Committee may award. Before the award there could be no right. After the award there could not be any claim to anything except as awarded. The decision of the Committee was made final and conclusive. In this respect the matter was left exactly as it was under the Superannuation Acts. So, in my opinion, the matter stood when the Treaty was made.

(1) [1915] 1 K. B. 852.

We had a long and interesting discussion as to the legal character of this historic document—whether it was a treaty properly so called, constitutionally and internationally such a treaty as is made between two Sovereign Powers—and whether it could give rights to individual members of the State. I do not think that we are concerned with these interesting questions, because the Treaty was incorporated in the Constitution, and the rights, if any, of the plaintiffs given or intended to be given by the Treaty are given by the Constitution.

The Constitution, by Art. 78, provided that the Civil Servants should be entitled to the benefit of Art. 10 of the Treaty. This had exactly the same legal effect as if Art. 10 had been made a substantive Article of the Constitution. We are, therefore, relieved from all embarrassing considerations of the exact character of the Treaty, and we may only consider the Constitution.

I will assume that Art. 78 of the Constitution did give a right to each individual Civil Servant. But what was the nature of the right? Not a right to any particular sum or sums of money, or to have these moneys calculated in any particular way, but a right to the benefit of an agreement by the Irish Free State to pay fair compensation on terms not less favourable than those accorded by the Act of 1920.

The case was argued on behalf of the plaintiffs as if they had rights under the Act of 1920. But that is not so. That Act, once the Constitution became established law, ceased to have any legal effect, and all rights under it disappeared. Another right was substituted—that is, a right to fair compensation by the Government of the Irish Free State on terms not less favourable than those accorded by the Act of 1920. Now I have to ask myself: Was it intended by the 78th section of the Constitution to give to each Civil Servant in Ireland a right of action to recover what he considered he was entitled to? If such a right was conferred, it is a right wholly different in character from what was intended by the Act of 1920, which submitted the adjustment of claims to the determination of the Civil Service Committee, whose award should be final and conclusive.

It might, perhaps, have been a wise provision if, in lieu of the Civil Service Committee, which in the circumstances became defunct, some other body was set up to settle the claims of the Civil Servants, and no doubt the Government of the Irish Free State felt some embarrassment from a defect in the machinery by which Art. 10 of the Treaty was to be put into operation. In consequence of the omission to set up some independent body, such as the Civil Service Committee, to assess compensation, the Minister for Finance found himself, by virtue of the Transfer of Functions Order, in the very same position as the English Treasury would have been in were it not for the creation of the Civil Service Committee under the Act of 1920. It appears to

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have been recognised that if the Free State Executive proceeded directly to assess the compensation, there would be a feeling that it was not fair play to leave the assessment to those whose interest it would be to pay as little as possible. In order to give no ground for any such feeling, the Executive, acting according to the spirit of the Act of 1920, set up a Committee, whose duty would be to advise them what compensation should be awarded to retiring Civil Servants, the intention being that the Executive should act on the advice given.

This Committee was constituted on lines strictly analogous to those of the Civil Service Committee. Mr. Justice Wylie, a Judge of the High Court, and absolutely independent of the Executive, was made Chairman. The other members were: two appointed by the Minister for Finance and two appointed by the staff of Civil Servants. What may be called the rival interests were therefore represented. I cannot conceive any committee more fairly constituted, and I do not think that it can be urged with the least show of reason that, so far, the Executive were carrying out the agreement contained in the Treaty on terms less favourable than those accorded by the Act of 1920. A similar observation applies to the insistence of the Executive that the recommendations of the Committee, when adopted, should be final and conclusive. The determination of the Civil Service Committee was to have been final and conclusive. The Civil Servants are now no worse off. Their position is no less favourable than it was. In this respect I cannot find any breach of the Treaty.

In my opinion it was not intended by the Treaty to give Civil Servants rights of action for the recovery of compensation. The creation of such rights would completely alter their status as servants of the Crown.

During the course of the argument it was suggested that, as it would be the duty of the Committee when assessing claims, to inquire what would have been awarded under the Act of 1920 in order that no less favourable terms would be given, it might be the right of the plaintiffs and other Civil Servants to get a declaration as to the proper scales of compensation which are applicable. It is possible to make a declaratory order without giving ancillary relief; but it is well established that such an order cannot be made if the jurisdiction to give relief does not exist: *Barraclough* v. *Brown* (1).

For these reasons I am of opinion that the action was wholly unsustainable, and ought to have been dismissed; but, although this conclusion makes it unnecessary for me to say more, it is not, I think, improper to give expression to my views upon the particular questions which were submitted to the Court by the plaintiffs.

The points in dispute were: the application of what is known as "the sliding scale" to so much of the pension as is attributable

(1) [1897] A.C. 615.

to the bonus, and an "over-riding maximum." On these two points I think that the determination of the Committee was right. Both the plaintiffs remained in office until the year 1923, and had the benefit of the Treasury Minutes made down to that date. A Treasury Minute of the 20th March, 1922, made pensions which should be attributable to bonus subject to readjustment—that is, to the sliding scale; and it seems to me that the plaintiffs were seeking to have the benefits of Treasury Minutes up to their retirement without submitting to any conditions imposed by them. Their case looks like one of approbation and reprobation.

As to the "over-riding maximum," that seems to be imposed by the Superannuation Acts, and I do not see any way of escape from it.

There were some other points in issue, but they were settled by agreement.

In my opinion complete justice has been done.

FITZGIBBON J.:—I concur.

JOHNSTON J.:—As I have the misfortune to differ from my colleagues in this appeal, I desire to state as briefly as possible the reasons for the opinion at which I have arrived.

The case is one of very great importance, involving, as I think it does, the question whether the compensation under Art. 10 of the Treaty is payable *ex gratia* or *ex debito justitiae*.

The Treaty has been "given the force of law" by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), and now forms part of the municipal law of this country. It is, therefore, not the Treaty, as such, that the plaintiffs bring before us for interpretation, but the provisions of the statute No. 1 of 1922. The principle, therefore, which was applied in *Rustomjee* v. *The Queen* (1), and which was formally enunciated by Lord Thurlow in the case of *The Nabob of Arcot* v. *East India Company* (2), has no applicability here. During the argument there was some speculation as to the treatment accorded to discharged public servants on the happening of certain other great political changes. The Treaty of Peace, entered into between Great Britain and the United States in 1783 (which is to be found set out almost in its entirety in the report of *Doe, dem., Thomas* v. *Acklam* (3)), did not actually provide for compensation to existing officials; but it was agreed by Art. 5 that Congress should recommend the various State Legislatures to provide for the restitution of the "estates, rights, and properties" of British subjects which had been confiscated. The Act of Union (40 Geo. 3, c. 38 (Irish)) itself made no provisions for existing officers. That was done by a subsequent Irish Act (40 Geo. 3, c. 50 (Irish)), which contains in a Schedule the names of the officials who were to be compensated, with the amount of their respective pensions.

(1) 2 Q.B.D. 68. (2) 3 Bro. C.C. 292. (3) 2 B. & C. 779.

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Johnston J.

It is contended here on behalf of the defendant that the Minister for Finance, in carrying out the terms of Art. 10 of the Treaty with regard to public servants who are discharged by the Government of the Free State or who retire in consequence of the change of government, has all the powers that the Treasury formerly had in Ireland under the Superannuation Acts, and can decline to give any compensation whatever to the plaintiffs. It seems to me that that argument involves a misconception of the far-reaching effects of the Treaty and of the great peaceful revolution that that epoch-making charter brought about.

A Civil Servant holds his office during pleasure, and has no absolute right to any pension. The Superannuation Acts provide that the determination of the Treasury as to the grant or withholding of a pension shall be absolutely final, and the Courts have no power to interfere with such a result. That was the position of affairs down to the passing of the Government of Ireland Act, 1920.

If the Government that was proposed to be set up in "Southern Ireland" by that Act had functioned, the plaintiffs, with all other Irish Civil Servants, would have been entitled to the tenure, salary, and pensionable rights that are given by sects. 55 and 56 and Schedule Eight. It is necessary to observe that the Superannuation Acts are not formally incorporated with sects. 55 and 56, and they are given only a limited applicability to the various matters that are regulated by that legislation. A clear distinction is made between the "superannuation" payable to an existing officer who remains in the service of the Government of Southern Ireland or of Northern Ireland and the "compensation" payable to any existing officer "under the provisions of this Act" (sect. 55, sub-sects. 2, 3, and 4). As to the former, the Superannuation Acts would appear to apply in their generality. As to the latter, those Acts have only the limited application set out in the Eighth Schedule. A new body was to be called into existence for the purpose of those provisions, to be called the Civil Service Committee; and the Legislature thought it to be necessary, notwithstanding the numerous references to the Superannuation Acts in the Act of 1920, to enact specifically that the determination of that Committee on any claim or question relating to existing officers should be final and conclusive.

The Treaty, however, swept away all that, and a great deal more. It brought to an end the whole of the existing administrative, executive, and judicial machinery of the country, and made suitable provision for the substitution of something different. In bringing about that great change care was taken to provide compensation for the entire staff of public servants—"Judges, officials, members of Police Forces, and other public servants"—who had served, what may, for convenience, be called the old régime. It so happens in this particular case that the

persons seeking compensation are Civil Servants to whom the Superannuation Acts and the control of the Treasury would under the former circumstances have applied; but the superannuating of public servants in Ireland was in the past regulated by a maze of Acts, and if we are to give Art. 10 the scope for which the Attorney-General contends, we must in the appropriate case read into it, not only the Superannuation Acts, but the Judicature (Ireland) Acts, the County Court Acts, the Constabulary Acts, the Irish Land Code, the Petty Sessions Clerks Acts, 1858 and 1881, and numerous others; and we must regard Art. 10 as having impliedly carried on to the Free State Government the powers and duties as to superannuation of not only the Treasury, but the Crown, the Lord Lieutenant acting alone, the Lord Lieutenant and the Treasury jointly, the Chief Secretary for Ireland, and a number of other governmental authorities. It seems to me that that is putting too much of a strain on the phraseology of Art. 10, which simply provides that fair compensation is to be paid to the public servants to whom it refers, subject to the terms being not less favourable to the official than those that he would have got under the appropriate section or Schedule in the Act of 1920—namely, sects. 54, 55, 56, 57, 58, and 60, and Schedules Eight and Nine. The contrast between the responsibility assumed by the British Government for compensating the members of the Auxiliary police forces and that of the Free State Government for compensating public servants generally is of some importance. In the latter case "fair compensation" is agreed to be paid. In the former the agreement is to pay "such compensation or pensions as may be payable to any of these excepted persons."

This case has to some extent been argued on behalf of the defendant as if the plaintiffs were seeking superannuation allowances from their own governmental employers. I am unable to regard the facts from that angle. The plaintiffs are seeking compensation from an entirely new governmental authority, who have bound themselves by Act of Parliament to pay it. The Free State Government did not originally employ these men, and were not their employers, save only for a very short time, and for a very special purpose. The contract with Great Britain to pay compensation was made when the Treaty was signed. It was made with the persons designated in Art. 10 when the Act No. 1 of 1922 was passed, and the authority liable to pay the compensation is the Government of the Irish Free State. If it was necessary—and I assume that it was—that the duty of carrying out the terms of Art. 10 should be assigned to one of the Ministries of the Free State, that Ministry, in my opinion, is only the agent of the Government for the purposes of Art. 10, and has no authority to import into the legislation a condition which is not there, and which, if it were there, would make the Article self-contradictory. If the Minister has a discretion to withhold compensation entirely (as he undoubtedly has if he is

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simply the *alter ego* of the Treasury in carrying out the provisions of the Superannuation Acts), I can only say that Art. 10 is most unfortunately phrased. But I do not take that view.

In every instance where the Legislature has entrusted a ministerial authority with the grave duty (which, as was pointed out by the Lord Chief Baron and Lord Justice FitzGibbon in the *Wexford Case* (1), is essentially judicial in its character) of finally determining the right to, and the amount of, a pension, it has done so in express terms. In this connection the weighty observations of the Lord Chief Baron in the *Wexford Case* (1), as to the powers of the Court in regard to the exercise by the Treasury of judicial powers conferred by statute, are very much to the point. His concluding words are (2): "The reason why there are no cases in the books as to certiorari to the Treasury in reference to pensions is not far to seek. The Superannuation Acts contain an express provision that the decision of the Treasury is conclusive, and, as a general rule, pensions are granted *ex gratia,* not *ex debito justitiae.*" That was the principle which the Free State authorities themselves were careful to adopt in framing the Superannuation and Pensions Act, 1923 (No. 34 of 1923), under which finality of determination was expressly preserved to the Minister for Finance.

I think that Art. 10, as confirmed by Arts. 76, 77, and 78 of the Constitution, gives the plaintiffs, as the public servants of a former governmental authority, a definite legal right—namely, the right to compensation; that that right is different in its character from the right to—or rather the possibility of receiving—a pension given by the Superannuation Acts, and that the determination of the Ministry of Finance as the authority to which the duty of assessing the compensation has been delegated by the Free State Government is not final in the sense that the determination of the Treasury would have been final if these persons had been retiring under the Superannuation Acts, or in the sense that the determination of the Ministry of Finance would be final if it were pensioning off one of its own Civil Servants. It has been established by a long series of authorities, the latest of which are *The King* v. *Board of Education* (3) and *Dyson* v. *Attorney-General* (4), that the Ministerial departments of the Government, in carrying out their statutory duties, are subject to the general control of the Courts. One of the earliest of these cases was *Hodge* v. *Attorney-General* (5), in which an order was made in the Exchequer against the Crown, declaring that the plaintiff was an equitable mortgagee of certain property of a convicted felon, and directing an account to be taken of what was due on foot of the charge.

The jurisdiction of the Courts to keep within legal limits the exercise by public departments of their statutory duties

(1) [1902] 2 I. R. 349.
(2) [1902] 2 I. R., at p. 375.
(3) [1910] 2 K. B. 165.
(4) [1911] 1 K. B. 410.
(5) 3 Y. & C. Ex. 342.

is established very clearly in the two modern cases to which I have referred; and that jurisdiction is subject to the limitation that "if the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere": per Farwell L.J. in the *Board of Education Case* (1).

The principal matter involved in this action goes far beyond the mere question of the exercise of discretion by the Ministry. The defendant claims that the Minister has the power to withhold compensation entirely from the plaintiffs. That is a basic matter, in respect of which, in my opinion, the plaintiffs are entitled to a declaration from the High Court of the Free State; and I cannot help thinking that my view is very much more in consonance with the dignity, the prestige, and the honour of the Free State than the view put forward on behalf of the defendant, namely, that questions in dispute as to the interpretation and scope of Art. 10 should be left to be settled by diplomatic action.

Having expressed my own personal view as to the principal question that has been discussed, it is unnecessary for me now to do more than indicate very briefly my opinion with reference to the specific questions in the action. It seems to me reasonably plain, first of all, that the war bonus is part of a Civil Servant's remuneration, and I think it could not be regarded as "fair" to leave it out of consideration in calculating compensation. In the Treasury Minutes it is called "an increase of wages by way of bonus" and "further temporary increases of remuneration owing to war conditions." Its object was not to give some additional remuneration to Civil Servants, but "to assist in meeting the increased cost of living owing to the war." In all other occupations the wages of labour had gone up, and in conformity with labour conditions it was necessary that the purchasing power of the Civil Servant's remuneration should be kept as nearly as possible at its pre-war level. At first the so-called "bonus" was altered as each change in the cost of living took place; but eventually the Whitley Committee Report of May 8th, 1920, recommended an ingenious scheme by which the bonus was to be dependent on a standard cost of living figure of 130. It was to be revised periodically as the cost of living, determined in accordance with the scheme, rose or fell. Henceforth a Civil Servant's salary was to consist of two portions: one the fixed portion, representing his pre-war salary; the other the variable portion, representing the addition necessary to keep his salary at its former purchasing power. The Treasury Minute that was in operation when the Treaty was "ratified by the necessary legislation" was the Minute of March 20th, 1922. It states that it originated in an "undertaking" given in Parliament by the Financial Secretary to the

(1) [1910] 2 K. B., at p. 179.

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Treasury that "every pension granted to a Civil Servant who retires on or after the 21st February last shall be granted on such a basis that it shall be brought by periodical reassessment into relation with the cost of living"; and that it had become evident that the bonus paid to Civil Servants in consequence of the increase of the cost of living, though temporary and fluctuating, had become a regular part of the Civil Servant's remuneration. Accordingly it was decided that "in future that part of the annual allowance which is computed on bonus must be brought more closely into relation with the cost of living at the time of retirement, and must be subject to reassessment quarterly." I am of the opinion that the plaintiffs, when the Treaty came into operation in 1922, were entitled to salaries which consisted of (*a*) their substantive salaries and emoluments and (*b*) the bonus addition.

Art. 10 entitles public servants to be paid "fair compensation"—the dominating phrase in the Article—"on terms not less favourable than those accorded by the Act of 1920." I think that the plaintiffs are entitled to a declaration that bonus is part of the emoluments and salary formerly enjoyed by them, and that they are entitled to have the bonus taken into account in the fixing of their pensions, and of Mr. Cochrane's additional allowance, in accordance with the Minute of March 20th, 1922; but I have some difficulty in seeing anything unfair—from the point of view of Art. 10—on the part of the Ministry of Finance in fixing the bonus on the sliding scale and subject to the overriding maximum for which the Ministry contends. Nor do I see anything unfair in Mr. Cochrane's additional allowance being calculated upon seventy-five per cent. rather than upon the whole of the bonus. The amounts arrived at by such a method of calculation can scarcely be described as unfair compensation. Based strictly upon the appropriate Treasury Minute, the terms are certainly not less favourable than those accorded by the Act of 1920. If the political changes of 1921 and 1922 had not taken place, and if these gentlemen had retired at that time, they certainly would have got no more than they have been accorded now by the Ministry of Finance, and I am certain they would not have thought of claiming more.

Solicitor for the appellant: *The Chief State Solicitor.*
Solicitor for the respondents: *W. J. M. Coulter.*

PATRICK J. MULLIGAN *v.* EDMUND A. CORR.
(1925. No. 4816.)

Meredith J.
1925.
June 17, 18.
Supreme Court.
1925.
July 14, 15, 16, 31.

Contract—Restraint of Trade—Solicitor and Managing Clerk—Contract of Service—Covenant not to practise within certain areas—Reasonableness—Ambiguity in contract—Severability of parts of contract.

Plaintiff, having been admitted a solicitor, opened an office in Ballina, Co. Mayo, and a branch office in Charlestown, about 18 miles distant. At the same time he entered into an agreement in writing with the defendant, a solicitor's clerk of ten years' standing, by which he agreed to engage the defendant as his assistant for a period of twelve months, and on the expiration of the twelve months to grant to the defendant indentures of apprenticeship without requiring the payment of any fee, and without any reduction of the defendant's salary during such apprenticeship; and the defendant agreed not to practise within thirty miles from the towns of Ballina and Charlestown when qualified as a solicitor, nor within twenty miles from the town of Ballaghadereen, Co. Roscommon. When qualified, the defendant commenced to practise in partnership with another solicitor whose office was close to that of the plaintiff's in the town of Ballina. The plaintiff sought an injunction to restrain the defendant from practising as a solicitor within thirty miles from the towns of Ballina and Charlestown, or within twenty miles from Ballaghadereen.

Meredith J., holding that the restriction was severable as regards each area defined, granted an injunction restraining the defendant from practising as a solicitor in the town of Ballina or within thirty miles from that town.

Held by the Supreme Court (reversing Meredith J.), that the restriction could not, on any view of its construction, be upheld in its entirety, as the area which the plaintiff endeavoured to protect was too large, and went far beyond anything which he could reasonably require for his protection; and, even if the restriction was severable as to the areas defined, it could not be supported, as it was not reasonable or necessary for the protection of the plaintiff that the defendant should be restrained from practising at any place which was within a distance so great as thirty miles from Ballina and Charlestown, or from either of those towns.

WITNESS ACTION.

The plaintiff, a solicitor, practising in Ballina and Charlestown, in the County of Mayo, claimed an injunction to restrain the defendant, who was also a solicitor, from practising within thirty miles from Ballina and Charlestown, or within twenty miles of Ballaghadereen, in the County of Roscommon, in breach of an agreement entered into by him. The agreement which had been entered into between the plaintiff and defendant was dated the 18th of February, 1919, and under it the plaintiff engaged defendant as his assistant for twelve months at a salary of £3 a week, and at the end of the twelve months he agreed to give the defendant articles of apprenticeship without fee; and the defendant agreed, when qualified as a solicitor, not to practise within thirty miles from Ballina and Charlestown, or within twenty miles from Ballaghadereen. Subsequently plaintiff gave defendant his articles of apprenticeship, as agreed, but that indenture contained nothing to restrain defendant from practising in the towns mentioned. Defendant in due course qualified as a

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solicitor, and shortly afterwards entered into partnership with a solicitor who had his office close to the plaintiff's in the town of Ballina. The plaintiff then brought the action. The material portions of the evidence appear from the judgment.

Defendant contended that, as a matter of fact, the restrictive clause in the agreement had been waived by consent, and had for this reason been struck out of the draft indenture of apprenticeship, and was to be treated as having been rescinded; and that, as a matter of law, the restraint contained in that clause was not reasonably necessary for plaintiff's protection, and that it was also contrary to the public interest.

Leonard K.C., Carson K.C., and *Fitzgerald Kenney,* for the plaintiff.

Lupton K.C., Costello K.C., and *Conor Maguire,* for the defendant.

Cur. adv. vult.

June 18.

MEREDITH J.:—The clause of the agreement restraining the defendant from practising within the area defined has unquestionably been broken. The main defence relied on is that the area in which the defendant is precluded from practising is unreasonably wide, particularly because the limit approaches so near to Roscommon, where the defendant might reasonably be expected to desire to set up business, and that, consequently, the clause is bad in its entirety, and therefore the defendant is justified in starting business in partnership with Mr. Ruttledge, solicitor, Ballina, a few doors from the plaintiff's office. There is no doubt on the authorities that some restriction would have been valid, and as what the defendant has actually done would be within any conceivable restriction, however limited, the defendant has no merits so far as this defence is concerned.

But, before dealing with this point further, I shall dispose of the other defences set up. On the evidence I find that there was neither waiver nor acquiescence on the part of the plaintiff. Further, the conversations between the plaintiff and defendant, in which the plaintiff stated what his attitude would be in certain events, left the contract where it was and could not effect a variation. The point, however, that gave me most difficulty was the contention that the indentures of apprenticeship superseded the agreement so far as concerns the clause in question. Now, if the clause in question were simply a provision as to a clause to be inserted in the indentures, there would be much to be said for this contention. But on the true construction of the agreement it seems to me that the agreement as a whole was not to be superseded, satisfied and determined by the granting of the indentures of apprenticeship, but that after the indentures had been granted the relation of clerkship under the agreement might continue, and that the agreement, with the clause in question, would continue to regulate the rights of the parties. Accordingly, I hold that the granting of

the indentures was merely a satisfaction of one clause of the agreement, and that the non-inclusion in the indentures of any provision restricting practice is immaterial.

As to the main defence, the law on this subject is, in its general terms, clearly stated by Tindal C.J. in *Hitchcock* v. *Coker* (1), as follows:—"Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." But, as to what the protection of the party "can possibly require," the question is sometimes one of degree. Thus, it might be quite apparent that a radius of twenty miles from some town would be reasonable, though if the radius stipulated for were thirty miles it might be difficult to say that the extra ten miles were really required. In such cases it seems to me that it is right and proper to look also to the significance of the difference from the point of view of the party subjected to the restriction. If, having regard to the extent of the area left free to him, it must be a matter of comparative indifference whether the radius be of twenty or thirty miles, the law could hardly tolerate the provision being defeated by any difficulty in strictly proving the actual necessity of the addition of the immaterial ten miles. But if the additional ten miles were, at the time the contract was formed, a vital matter for the party bound by the restriction, then the addition would have to be more strictly justified. That seems clear when it is remembered that the whole of the law on this subject originates in an anxiety to deal fairly between both parties. The competing interests of freedom of contract and reasonableness of certain restraints have to be balanced, looking to both sides of the question as between man and man. This aspect of the question seems to have been recognised by Sir George Jessel in *May* v. *O'Neill* (2):—"However numerous the plaintiff's clients may be, there must be plenty left for the defendant, if he can gain their confidence."

This aspect seems also to have been stressed by Lord Birkenhead in the case of *Fitch* v. *Dewes* (3):—"It might perhaps be more properly stated—as it has sometimes been with the highest authority stated—does it exceed what is necessary for the protection of both the parties?"

In the present case it seems to me that the area defined by a circle with a radius of thirty miles from Ballina is clearly reasonable from every point of view. Further, whether the large extent of the actual restriction in the clause was reasonable or not, I am satisfied that an injunction confined to the area defined by a circle drawn with a radius of thirty miles from Ballina is, as matters now stand, all that is necessary to protect the plaintiff's actual interests. Further, I regard the

(1) 6 Ad. & E. 438, at p. 454. (2) 44 L. J. Ch. 660, at p. 661.
(3) [1921] 2 A. C., at p. 163.

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provision as severable as regards each area defined. That seems particularly clear from the fact that otherwise the definition of the area described as twenty miles from Ballaghadereen is meaningless, since that area falls completely within the other two circles. That shows that each circle was considered separately. The case seems well within the decisions as to severability. Hence I shall confine the injunction to the Ballina circle. But I do so without saying that if I had to consider the provisions as to the different areas as one indivisible definition of a single area I would not regard the whole area as reasonable. But, holding that it is allowable, having regard to the authorities, to sever the provision in respect of the different circles, and recognising that the additions to the Ballina circle involve a close approach to Roscommon, which was of importance to the defendant, I look at the other circles, standing each on its own merits, as raising a point of some doubt, which I need not decide, having regard to what I have held in respect of the Ballina circle.

G. G. D.

The defendant appealed (1).

Lupton K.C. and *Costello K.C.* (with them *C. Maguire*), for the appellant:—

The principles which govern cases in restraint of trade like this are laid down in *Fitch* v. *Dewes* (2). The tests to be applied are:—(*a*) does the agreement offend against the public interest? and (*b*) does it exceed what is reasonably necessary for the protection of the covenantee? These tests simply mean a consideration of the question whether the agreement, taken in its entirety, is reasonable. In determining that question the point whether or not the plaintiff could, by a properly framed agreement, have protected himself is of no relevance.

The covenant in this case is one against competition, and the area, embracing one-tenth of the Irish Free State, in which it prevents the appellant from practising is so wide as to make the agreement unreasonable. A covenant against competition *per se* will not be enforced: *Morris* v. *Saxelby* (3). In *May* v. *O'Neill* (4) the defendant covenanted with the plaintiff that he would not at the expiration of a certain term, or at any time thereafter, directly or indirectly practise the business of an attorney or solicitor within the City of London, or the counties of Middlesex or Essex. That restriction was upheld, but in *Fitch* v. *Dewes* (5) Lord Birkenhead states that he is not to be taken as assenting to the view taken by the then Master of the Rolls upon a restriction so extremely wide. [The following

(1) In the Supreme Court, before KENNEDY C.J., FITZGIBBON and MURNAGHAN JJ.

(2) [1921] 2 A. C. 158.
(3) [1916] 1 A. C. 688, at p. 709.
(4) 44 L.J. (Ch.) 660.
(5) [1921] 2 A. C. 158, at p. 167.

other authorities relating to restrictive covenants in the case of solicitors were cited: *Woodbridge & Sons* v. *Bellamy* (1); *Freeman* v. *Fox* (2); *Nicholls* v. *Stretton* (3); *Lewis and Lewis* v. *Durnford* (4); *Hayne* v. *Burchell and Others* (5).]

Where an agreement in restraint of trade is unreasonable, the Court will not, by severing the good part from the bad, mould a covenant for the parties so as to make the agreement reasonable. The Court must find in the agreement itself sufficient ground for making the severance; the Court must take great care not to create a new agreement for the parties, nor to carve out of an unreasonable agreement something which would be reasonable, for the sake of upholding what would be otherwise void: *Mills* v. *Dunham* (6), per Chitty J. In this case Meredith J. made a new covenant for the parties. It is in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held to be void *in toto*: *Goldsoll* v. *Goldman* (7), per Neville J. In *Attwood* v. *Lamont* (8), Sankey J. states that "one rule, however, may be deduced from the decisions, and that is, that where, as here, there is a series of distinct obligations in separate and clearly defined divisions, and not merely one obligation framed in alternative manners, the Court may sever." Here the covenant contains only one obligation. We also rely on the observations of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (9).

Leonard K.C. and *Carson K.C.* (with them *J. Fitzgerald Kenney*), for the respondent:—

The fact that the defendant got his indentures from the plaintiff without any fee distinguishes this case from that of an ordinary employer and employee. In the circumstances the plaintiff was entitled to protect himself against competition. The covenant is reasonable because in 1919 both parties agreed that any smaller area might have been inadequate for the protection of the plaintiff. In *Hitchcock* v. *Coker* (10) it was held that a covenant in restraint of trade was not unreasonable by the circumstance that its duration was not limited to the life of the plaintiff or to the time during which he should carry on the business to which the restraint related. The covenantee cannot escape liability under a contract like this unless he can show that the contract was induced by fraud, duress, or undue influence, or impeachable on any other recognised ground of invalidity: *E. Underwood & Sons, Limited,* v. *Barker* (11).

(1) [1911] 1 Ch. 326.
(2) 55 S. J. 650.
(3) 10 Ad. & E. (N. S.) 346.
(4) 24 T. L. R. 64.
(5) 35 S. J. 88.
(6) [1891] 1 Ch. 576, at p. 580.
(7) [1914] 2 Ch. 603, at p. 613.
(8) [1920] 2 K. B. 146, at p. 159.
(9) [1913] A. C. 724, at p. 745.
(10) 6 Ad. & E. 438.
(11) [1899] 1 Ch. 300, at p. 305.

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[Other authorities cited: *Continental Tyre and Rubber (Great Britain) Company, Limited*, v. *Heath* (1); *Mallan* v. *May* (2); *Whittaker* v. *Howe* (3); *Edmundson* v. *Render* (4).]

In *Tallis* v. *Tallis* (5) a covenant dealing with different areas was severed.

Lupton K.C., in reply.

Cur adv. vult.

July 31.

The judgment of the Court was delivered by FITZGIBBON J.:

The plaintiff is a young man, who was admitted a solicitor in the Michaelmas Term of the year 1918. He was a native of Charlestown, in the County Mayo, and with a view to practising in his native county, he opened an office in January, 1919, in Ballina and a branch office in Charlestown, 18 miles away. At the same time he instructed his town agent, Mr. Fagan, to obtain a managing clerk for him. Mr. Fagan got into communication with the defendant, and after a couple of interviews the agreement which has given rise to this action was entered into. It is admitted that the draft was prepared by the defendant himself, who had had about ten years' experience as a solicitor's clerk, and the plaintiff appears to have entrusted the care of his interests entirely to Mr. Fagan, so that there is no ground for suggesting that the defendant was subjected to undue pressure, or overreached, by his employer.

The agreement is dated the 18th day of February, 1919, and provides that the plaintiff should engage the defendant as his assistant for 12 months from its date, at a salary of £3 a week payable weekly; that on the expiration of the 12 months the plaintiff should grant the defendant indentures of apprenticeship without any fee, that his salary should not be reduced during the apprenticeship, but that no salary should be payable for any week during which the defendant was absent in attendance on lectures in connection with his apprenticeship, and the agreement then contains the following clause: "3.—The said Edmund A. Corr agrees not to practise within thirty miles from the towns of Ballina and Charlestown when qualified as such solicitor, nor within twenty miles from the town of Ballaghadereen."

The salary of the defendant was raised to £3 10s. a week in June, 1920, and on November 8th, 1921, indentures of apprenticeship in the usual form were executed. A further increase of 10s. a week in the defendant's salary was made in February, 1923, and on December 31st, 1923, it was raised to £5 a week.

The defendant passed his final examination, and was admitted a solicitor in October, 1924, and at once proceeded to look out for some place in which to practise on his own account. At first he appears to have contemplated a return to County

(1) 29 T. L. R. 308.
(2) 11 M. & W. 653.
(3) 3 Beav. 383.
(4) [1905] 2 Ch. 320.
(5) 1 E. & B. 391.

Donegal, where he had spent several years with a solicitor, and when that fell through, he discussed the question of partnership with Mr. Crean, at Ballyhaunis, a town within the area where the defendant was precluded by his agreement from practising. Some discussion took place about the effect of the agreement, to which the plaintiff said he would hold the defendant, though he did not apparently object to his going to Mr. Crean, but it is unnecessary to consider it, as the defendant did not go to Mr. Crean, and we entirely agree with the view taken by Meredith J. that the defences founded upon rescission by mutual agreement and waiver are wholly unsustainable. In March of the present year, while the plaintiff was at the Castlebar Assizes, and while the defendant was still in his employment, a rumour appears to have come to the plaintiff's ears which brought him back to Ballina, where the defendant informed him that he had "practically arranged" with Mr. Ruttledge, a solicitor who practises in Ballina and whose office is "second next door" to the plaintiff's. The plaintiff at once informed the defendant that he would insist upon the terms of his agreement, and the defendant defied him to do his worst. On his return from the Assizes four days later the plaintiff was greeted with an advertisement of a sale, stating that: "Particulars and conditions of sale may be had on application to P. J. Ruttledge and Corr, Solicitors having carriage of sale, Ballina"; and shortly afterwards he received letters signed: "Ruttledge and Corr," upon notepaper stamped "Ruttledge & Corr, Solicitors. Patrick J. Ruttledge. Edmund A. Corr," requesting him to hand over to them the papers of clients of his own who had consulted them since the defendant went into partnership with Mr. Ruttledge. Upon the methods adopted by the defendant as a member of an honourable profession there can be only one opinion, but we have only to decide whether he can be restrained by this Court from repudiating an agreement entered into by him, from which he, at any rate, has derived all the benefits to which he was entitled under it, and more.

The principles of law applicable to covenants of this description in restraint of trade may be regarded as now finally settled; the only difficulty is to ascertain the facts to which they are to be applied.

The restriction imposed must not be greater than is reasonably required for the protection of the covenantee. If it exceed in area or duration the limits which the Court considers reasonable it is void. The question of reasonableness is one of law for the Court to decide. A restriction though unlimited as to space may be reasonable if confined to a period of reasonable duration. All these points were settled by the *Nordenfelt Case* (1) some thirty years ago, and the converse of the last proposition, viz.: that a restriction, though unlimited in point of time, was valid if limited to a reasonable area, was decided by the House of Lords in 1921 in the case of *Fitch* v. *Dewes* (2), which was,

(1) [1894] A. C. 535. (2) [1921] 2 A.C. 158.

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FitzGibbon J.

like this, an action brought by a solicitor to restrain a former clerk from practising as a solicitor within a radius of seven miles of the Town Hall of Tamworth, in breach of an agreement entered into by him, when taken into employment as managing clerk ten years previously. The area in that case was smaller than this, but it included a thickly populated district and portions of four English counties, Stafford, Warwick, Leicester, and Derby.

The first question we have to decide is the true construction of the covenant in the present case. The defendant has contended that it prohibits him from practising within three separate circles, one having Ballina as its centre with a radius of thirty miles, another of like radius having Charlestown as its centre, and a third with a radius of twenty miles and Ballaghadereen as its centre, and maps marked by an engineer with these three circles have been given in evidence, and that this is the true construction has not been disputed by the plaintiff and was decided by Meredith J. It is not clear that this is the true interpretation of the clause, and I think the maps rather support a different construction, based on grammatical considerations, for it will be seen that the Ballaghadereen circle falls entirely within the Charlestown circle, and the prohibition relating to it was therefore wholly unnecessary. In case of ambiguity, a contract should receive an interpretation which will give some effect to every provision in it, if such a construction is reasonably practicable, and by construing the restriction regarding Ballina and Charlestown as prohibiting practice at any place within thirty miles of *both* towns, there will be a considerable area left to be included by the Ballaghadereen circle, comprising such important places as Carrick-on-Shannon, Castlerea, Boyle, and Dromahaire. Assuming the construction placed upon the agreement by the parties to be correct, does the restriction exceed that which was reasonably necessary for the protection of the plaintiff? He had not been long in practice, but he had good connections and might reasonably expect, before the defendant would be out of his indentures, to build up a fair business, which he was entitled to protect against the possibility that his managing clerk, with all the knowledge acquired in the plaintiff's service of the plaintiff's clients and their affairs, might set up, as he has done, in opposition to his former employer.

In my opinion, however, the area which the plaintiff endeavoured to protect was too large. It was certainly so if it included the two thirty-mile circles. They covered three county Assize towns, practically the whole of Mayo, more than half of Sligo, a large part of Roscommon, and portions of Galway and Leitrim. That appears to us to go far beyond anything which the plaintiff could reasonably require for his protection. Even the more limited area which I believe to be covered by the clause is, in my opinion, excessive. The plaintiff does not appear to have done much business in Ballaghadereen or its vicinity,

and it was suggested at the Bar by his counsel that the reason for including Ballaghadereen in the agreement was that if he did not make good in Ballina he might go to the other side of the county and work Ballaghadereen alone or in connection with Charlestown. If this were so, a restriction imposed to protect a business which was not in fact being worked and might never be set up at all was quite unreasonable.

Having come to the conclusion that the agreement cannot in any view of its construction be upheld in its entirety, questions arise whether it can be divided, and, if so, whether any fraction of it can be supported as reasonable.

As to the former, this restrictive covenant falls in our opinion within the principle of decisions such as *Mallan* v. *May* (1), the case of a dentist's assistant; *Green* v. *Price* (2), the case of the perfumery business; *Davies* v. *Lowen* (3), the case of the carrier's clerk; and if, by eliminating part which appears to be void, we can leave a valid and effective contract remaining, such a course is lawful, though the Court cannot make a new covenant or mould one which is already complete in itself so as to create a different restriction which would be reasonable in the opinion of the Court. I confess that my own opinion has fluctuated during the argument (which was ably conducted on both sides), and since; but after very careful consideration, we have come to the unanimous conclusion that it is not reasonable for the plaintiff, though practising and having offices both in Ballina and Charlestown, to insist that his managing clerk should not practise or set up a business in any place which was within a distance so great as thirty miles from both or either of those towns. Even the more restricted area includes the town of Sligo, and although that part of County Sligo which is served by Ballina or Charlestown, each of which actually touches the county border, might fairly be the subject of a protective clause, we cannot hold that it is necessary for the fair protection of the plaintiff that the defendant should be precluded from practising in the capital of the adjoining county, a restriction which would in effect have debarred him from taking business at the Assizes from any part of the County Sligo, and would exclude him from all that portion of County Sligo which lies outside the thirty-mile circle, but whose inhabitants resort to Sligo for legal advice. There is no possible construction of this agreement which would not include the town of Sligo in the prohibited area, and the Ballina circle, which was adopted by Meredith J., would include Westport, as well as Claremorris and Ballyhaunis, none of which is shown to be in any real competition with Ballina for legal affairs so far as the plaintiff is concerned. It is to be regretted that the plaintiff did not give fuller information as to his own business, and, in our opinion, having regard to the fact that, notwithstanding a dictum to the contrary of the Earl of Birkenhead (4), the onus appears to be upon the plaintiff to

(1) 11 M. & W. 653.
(2) 13 M. & W. 695; 16 M. & W. 346.
(3) 64 L. T. 655.
(4) [1921] 2 A. C., at p. 162.

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establish the reasonableness of the restriction imposed, we have come to the conclusion that it is not reasonable or necessary for the protection of the plaintiff's business that the defendant should be restrained from practising as a solicitor at any place within thirty miles of Ballina and Charlestown or of either of those towns.

KENNEDY C.J. :—

Associated as I am, by virtue of my office, with the discipline and government of the solicitors' profession, I wish to add these observations to the judgment of the Court. The defendant, who has succeeded on this appeal in establishing a legal right to start his career in the profession to which he has but recently been admitted, in the town of Ballina, in the face of an agreement which he himself drew—but badly drew—for the protection of the interests of the plaintiff, should find no credit in the contemplation of his victory, or in the recollection of the events leading to the action as proved in evidence. It is an inauspicious beginning. Every man who appreciates the standards of conduct and of honour which are required of the members of that profession, required by its privileges and the great trusts confided to it, must be shocked by the defendant's first invitation of public confidence. While still in the paid employment of the plaintiff, he appears suddenly in an advertisement, published with unblushing impudence in the public press, as the partner of the plaintiff's next-door competitor. His counsel has said that there is a public policy which dictates the giving of facilities to solicitors' assistants to enter the profession. I must say here that there is a public policy which imperatively requires that the highest standards of conduct and honour shall be maintained in that profession, even if its membership should be thereby restricted. The defendant's counsel has suggested that, even in the capacity of paid assistant of his late employer's competitor, he would carry with him, for the competitor's benefit, a volume of information acquired in the course of his former employment. I must warn him to beware how he acts under any such theory, either in breach of sacred professional confidence by disclosure, even to his new partner, or in the discreditable pursuit of a clientèle. I regret that I should have to speak in this way, but the course of the case indicated a looseness of theory on these principles which I feel it my duty to condemn, lest the code by which the honour of the profession is upheld should be shattered, to the great detriment of the public.

Solicitor for the appellant: *F. Kennedy.*
Solicitor for the respondent: *J. Fagan.*

C. L.

IN THE MATTER OF THE TRUSTS OF THE WILL OF WILLIAM LALOR, DECEASED; DENIS JOSEPH COFFEY AND ALEXANDER ANDERSON *v.* MARY WILHELMINA BARRETT AND OTHERS.

Johnston J.
1925.
May 19.
June 9, 16.

(No. 6536. 1925.)

Will—Income of residuary estate—Income derived from "compounded arrears of rent" and "payment in lieu of rent" under Land Act, 1923—*Ascertainment of period when income accrued—Land Act,* 1923 (*No.* 42 *of* 1923), *sects.* 19 *and* 20.

Part of a testator's estate consisted of tenanted land to which the Land Act, 1923, applied, and the trustees of the will received from the Irish Land Commission certain sums in respect of "compounded arrears of rent" and "payment in lieu of rent" under that Act. It having become necessary to determine for what year these sums should be regarded as income:

Held that, in view of the control exercised by the Land Commission as regards both the time of payment and the collection of "compounded arrears of rent," and in view of the fact that the trustees of the will had no discretion in the matter, the moneys received by the trustees in respect of "compounded arrears of rent" should be treated as income of the period in which they were received, and that the moneys received in respect of "payment in lieu of rent," being in substance an abated rent, should be treated as income of the period in respect of which they were collectable.

SUMMONS.

The summons was taken out for the determination of certain questions arising under the will and codicils of William Lalor, of Rathgar Road, Dublin. After bequeathing certain pecuniary legacies, testator devised and bequeathed all his property of every kind and description not therein before specifically bequeathed, of or to which he might die possessed or entitled and over which he should have any disposing power unto his executors and trustees upon trust that his executors and trustees should call in, sell, and convert into money his real estate and such part of his personal estate as should not consist of money, and should out of the moneys to arise from such calling in, sale, and conversion and the money of which he should be possessed at the time of his death, but primarily out of his pure personalty, pay his debts, funeral and testamentary expenses, and the legacies other than and except the specific legacies and annuities bequeathed by his will or any codicil, and should invest the residue of the said moneys in the names of his executors and trustees in manner therein directed, and should stand possessed of the investments so made and of such portion of his personal estate as his executors and trustees in the exercise of the power in that behalf thereinafter given them should leave outstanding on investments existing at the time

Johnston J. 1925.

COFFEY AND ANDERSON *v.* BARRETT.

of his death and of the unsold real estate (all thereinafter called "the residuary fund"), in trust out of the income thereof to pay a number of annuities in the priorities and manner therein mentioned, and subject thereto, the testator directed his executors and trustees during the lifetime of his brother, Joseph Lalor, to hold the said "residuary fund" and all securities or lands representing the same and the income thereof in trust to pay the defendant, Mary Wilhelmina Barrett, during her life the residue of the income of the "residuary fund," and after her death that his executors and trustees should hold the entire of the capital of the "residuary fund" and all securities or lands then representing the same and the income thereof (subject to the previous trusts and provisions in his will) in trust as to one moiety thereof for the Senate of the National University of Ireland, and as to the other moiety thereof for the Governing Body of University College, Dublin. Testator died on the 26th April, 1921. Portion of the said "residuary fund" consisted of lands which were in the hands of tenants in respect of which there were arrears of rent due at the date of the passing of the Land Act, 1923, in consequence of which some of the annuities bequeathed by the will were not paid in full. The trustees received from the Land Commission certain sums in respect of "compounded arrears of rent" and also "payment in lieu of rent."

The questions for the determination of the Court (which are material for the purpose of this report) were as follow:—

"1.—Are the moneys received by the plaintiffs from the Land Commission in respect of 'compounded arrears of rent' and 'payment in lieu of rent' to be treated as income of the year in which they are received?

"2.—Are the moneys received by the plaintiffs from the Land Commission in respect of 'compounded arrears of rent' to be treated as income of the respective years in which the rent became payable?

"3.—Are the moneys received by the plaintiffs from the Land Commission as 'payment in lieu of rent' to be treated as income of the year in which the same became payable?"

Poole, for the plaintiffs.

Garrett Walker K.C., for several annuitants.

Marnan, for Mary Wilhelmina Barrett.

Naish, for Mary Sheehan, an annuitant.

Cur. adv. vult.

June 16.

JOHNSTON J.:—

The questions arising in this summons are concerned with the construction of the will and seven lengthy codicils of William Lalor, deceased. The plaintiffs are Dr. Denis Joseph Coffey, President of University College, Dublin, and Dr.

Alexander Anderson, who are the trustees and executors of the will, and the defendants are certain annuitants under the will. The deceased by his will and codicils, after providing for a number of legatees, directed his trustees, out of the income of his residuary real and personal estate (of which he formed a composite fund called "the residuary fund"), to pay annuities to certain persons. These annuities are to be paid in different priorities, and are of varying amounts; and, subject thereto, he gave the whole of "the residuary fund" to the Senate of the National University and to the Governing Body of University College, Dublin, in equal moieties. Part of "the residuary fund" consists of agricultural land to which the Land Act, 1923, applies, and the income arising from that land has been so altered in its nature and otherwise that it has become necessary to take the opinion of the Court as to its applicability.

The first question that I am asked to answer is as follows:— "Are the moneys received by the plaintiffs from the Land Commission in respect of 'compounded arrears of rent' and 'payment in lieu of rent' to be treated as income of the year in which the same are received?"

Sect. 19 of the Act of 1923 provides that, in the case of every holding to which the Act applies, rent and arrears of rent which accrued due up to and including the gale day next preceding the passing of the Act shall not be payable by the tenant, and no proceedings for the recovery of arrears of rent shall be begun, continued or enforced after the passing of the Act. In other words, the landlord's right to be paid any arrears of rent that may be owing is, in the case of holdings to which the Act applies, completely taken away. In place of such arrears the Act provides that a composite sum called "compounded arrears of rent" is to be paid by the tenant to the Land Commission, and by that body paid to the landlord after certain deductions have been made. The landlord's contractual right to recover these arrears is completely taken away by the Act, and a statutory right to something different is substituted. Portion of the compounded arrears of rent is to be paid immediately after the passing of the Act, and the balance on such date or dates before "the appointed day" as may be prescribed by the Land Commission. In any case where not less than three years' arrears are due, half a year's compounded arrears of rent may be added to the purchase money. The Land Commission is given complete control as regards the collection of this sum and extensive powers as regards its recovery, and the sum is to be paid to the person or persons entitled to receive the same, subject to the right of the Land Commission to deduct income tax and the cost of collection therefrom.

On the whole, in view of the control that may be exercised by the Land Commission as regards both the time of payment and the collection and recovery of compounded arrears of rent, and seeing that the trustees have no discretion in the matter, I

Johnston J. 1925.

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must come to the conclusion that the moneys arising therefrom should be treated as income of the period in which the same were received by the trustees.

As regards the "payment in lieu of rent" which is to be paid by the tenants as from the gale day next preceding the passing of the Act to "the appointed day," the matter is on a somewhat different footing. It seems to me that such payments are in substance an abated rent. The Act provides that the Land Commission shall pay to the person entitled to receive the same "a sum equal to the amount to be collected as payment in lieu of rent from the gale day next preceding the date of the passing of this Act up to the appointed day." This sum is to be paid in equal half-yearly instalments and in accordance with rules made by the Land Commission.

I am satisfied that the moneys received by the trustees from the Land Commission as payment in lieu of rent should be treated as income of the period in respect of which the same was collectable.

That being my answer to question 1, it is unnecessary to say anything as to questions 2 and 3.

Solicitors for the plaintiffs: *E. & G. Stapleton.*

Solicitors for the annuitants: *E. & G. Stapleton* and *J. E. M'Dermott.*

R. R.

MARTIN, LANDLORD; M'KENNA, TENANT.

Wylie J.
1925.
June 30.

Landlord and Tenant—Land Purchase—"Tenanted Land"—Lease—Term of years with less than sixty unexpired—Effect of reversionary lease—Land Act, 1923 (*No.* 42 *of* 1923), *sect.* 73, *sub-sect.* 2.

A tenant who held lands under two leases both expiring on March 25th, 1947, had obtained from his landlord a reversionary lease of both holdings for 90 years from March 25th, 1947.

Held, notwithstanding the existence of the reversionary lease, that the lands were held for a term of years of which less than sixty were unexpired at the date of the passing of the Land Act, 1923, and that accordingly the lands were "tenanted land" within the meaning of sect. 73, sub-sect. 2, of that Act.

MOTION ON NOTICE.

Charles M'Kenna, the tenant, held the lands of Balbray, Bective, and Cloncullen, in the County of Meath, under two leases, both expiring on March 25th, 1947; but he had obtained from the landlord a reversionary lease of both holdings for 90 years from March 25th, 1947. The tenant by motion on notice asked for a declaration that, notwithstanding the existence of the reversionary lease, the lands were "tenanted lands" (1) and constituted a holding to which the Land Act, 1923, applied.

Marnan, for the tenant:—

The interest of the tenant under the reversionary lease is only an *interesse termini*. The law is stated in Halsbury, vol. 18, p. 405, par. 862:—"Although the present lease and the reversionary lease are vested in the same person, yet the estate under the former and the *interesse termini* under the latter remain distinct. The two terms are not added together so as to entitle the lessee to the same rights as though he had a present lease for the aggregate term." The word "term" has its ordinary legal meaning; and the only term here is the term ending March 25th, 1947. [He referred to *Llangattock* (*Baron*) v. *Watney, Combe, Reid, & Co., Ltd.* (2).]

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(1) Land Act, 1923 (No. 42 of 1923), sect. 73, sub-sect. 2—"The expression 'tenanted land' means land held under any contract of tenancy other than a fee-farm grant, or lease renewable for ever for lives or years, or lease for a term of years of which sixty or more are unexpired at the date of the passing of this Act . . ."

(2) [1910] 1 K.B. 236; affirmed [1910] A.C. 394.

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Poole, for the landlord :—

The interest of the tenant is in substance an interest of which one hundred and twelve years are unexpired. Assuming that the Land Commission were claiming that the land vested in them in face of the joint opposition of the landlord and the tenant, would the Court hold that the interest of the tenant was such that the Land Commission were entitled to claim the lands under sect. 24? The Court should not have regard to technicalities, but should consider what was the real relation between landlord and tenant. This is not a case of a reversionary lease to a stranger, but is an extension of his term granted to a sitting tenant.

I rely on the dissenting judgment of Palles C.B. in *Sproule* v. *Ramsey* (1). [He also referred to *Mann, Crossman, and Paulin* v. *The Registrar of the Land Registry* (2).]

WYLIE J. :—

The point that strikes me on the consideration of this case is that this new lease might have been made to some other person than the present tenant. In that event the applicant would claim to be entitled to the benefit of the Act. How can I give the section a different construction, simply because the interest of the lessee under the existing lease and the right conferred on the lessee by the reversionary lease are vested in the same person? The parties could, if they had so desired, have surrendered the old lease and taken a new one for the full period. In other words, they expressly kept them distinct and separate. If the two leases had been vested in different people, there would be a period at which the existing term would cease and the future term would begin to run. I cannot see why the same consideration would not apply in the present case. With reference to the judgment of Palles C.B. in *Sproule* v. *Ramsey* (1) I think I have to give the words in the section their legal meaning; and I cannot decide the case on what I might conceive to be the general policy of the Act. The word "term" has an exact legal meaning, and I hold in the present case that the lands were held at the date of the passing of the Act under a lease for a term of years of which less than sixty were unexpired at the date of the passing of the Act, and therefore they were "tenanted lands" within the meaning of the Act.

Solicitors for the tenant: *Hayes & Sons.*
Solicitors for the landlord: *Montgomery & Chaytor.*

T. C. T.

(1) 26 Ir. L. T. R. 4.

(2) [1918] 1 Ch. 202.

BUTLER *v.* BUTLER (1).

Supreme Court. 1925. Feb. 10, 11. March 6.

Equitable mortgage—Mortgagor in possession—Order appointing receiver—Time from which mortgagee is entitled to rents and profits—Distinction in case of bankrupt mortgagor — Order referring to Chambers account furnished by mortgagor — Consent of mortgagor — Effect of order—Estoppel.

The Supreme Court *held* that the owner of an estate which is subject to an equitable mortgage or charge is not bound to account as a trustee from the date of the institution of proceedings by the owner of the incumbrance to raise the amount thereby secured, or from the date of the order for sale; but from the date of the appointment of a receiver.

Position of the equitable mortgagee when the estate of his mortgagor is in bankruptcy distinguished and commented on.

Defendant, the owner of an estate which was subject to certain charges, consented to an order being made *ex parte* by the Judge referring to Chambers the account of receipts and outgoings which he had furnished to the plaintiffs, the chargeants, they having taken proceedings to raise the amount of the charges:

Held, on the facts, that the defendant had not estopped himself from disputing his liability to account.

APPEAL from an order of Meredith J., dated January 16th, 1925.

The following statement of facts is taken from the judgment of FitzGibbon J.:—

By his will, dated July 12th, 1870, Whitwell Butler, who died on November 16th, 1881, bequeathed the sum of £2,000 to each of his daughters, Mary and Elizabeth, and devised and bequeathed all the residue of his property, real and personal, to his son, Richard J. Butler, subject, *inter alia*, to these two legacies, and appointed R. J. Butler his sole executor.

R. J. Butler proved the will on January 25th, 1882, and went into possession of the property, which he continued to hold until his death on October 14th, 1908.

By his will, dated 29th September, 1903, he appointed his son, the defendant, Richard John Butler, junior, his executor, but did not make any further disposition of his property. The defendant proved the will, and appears to have gone into possession of the real estate of his father—as to part, as heir at law, as to part, which was held pur autre vie, as special occupant, and as to the chattels real, as executor.

The interest upon the legacies to Mary and Elizabeth Butler was then in arrear, and a deed of family arrangement, dated April 29th, 1909, was entered into by which the arrears of interest were stated to have been capitalised, and the legatees agreed to accept annuities which were charged upon the lands, but without prejudice to their rights to proceed for recovery of the capital. That deed is not now forthcoming, but the parties admit that its contents do not affect the question which is now before the Court.

Upon the death of Elizabeth Butler, who was the last life in the lease of the lands which were held pur autre vie, the

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

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defendant, who was also owner of the superior estate, became owner of the lands in fee-simple; and, desiring to sell some portion of the property upon which the legacies and annuities had been charged, applied to Mary Butler, the surviving legatee, for her consent to the sale free from incumbrances.

The deed of April 28th, 1909, could not then be found, and a new deed was executed on July 28, 1921, by the defendant and Mary Butler, specifically charging the lands with two sums of £2,500 in favour of Mary Butler.

Mary Butler died on October 14th, 1922, having bequeathed all the residue of her estate, which included these charges, to her nephews and nieces, the brothers and sisters of the defendant, and appointed the plaintiffs her executors.

Proceedings by way of originating summons were instituted by the plaintiffs on the 24th of January, 1923, for a declaration that the two sums of £2,500 were well charged upon all the lands of the defendant and to raise the amount by sale, and for a receiver, and for the usual accounts and other reliefs.

The summons was adjourned into Court, and came on for hearing before Dodd J., sitting for Powell J., on the 15th of May, 1923, when an order was made declaring that the plaintiffs were not entitled to any charge upon the lands of Staffordstown (the lands which had been held for an estate pur autre vie), and that, the defendant admitting the plaintiffs' right to a charge upon the lands of Gerrardstown, the principal moneys secured by the said indentures, dated July 28th, 1921, April 28th, 1909, and the will of Whitwell Butler, were well charged upon the defendant's interest in the lands of Gerrardstown, and it appearing to the Court that there was due to the plaintiffs "on foot of the said indenture" the sum of £4,950 for principal together with interest from the 14th day of October, 1922, at the rate of £4 per cent. per annum, it was ordered that the defendant should be at liberty to dispute these amounts within a month, and in default of his doing so, and in default of payment within three months, that the defendant's interest in the said lands should be sold through the Court. Inquiries as to incumbrances were directed, and the plaintiffs were ordered personally to pay the defendant's costs so far as they related to the lands of Staffordstown. The Court was not asked at that time to appoint a receiver. The plaintiffs appealed against this order to the late Court of Appeal, which affirmed the order of Dodd J. on July 11th, 1923. Upon November 6th, 1923, the plaintiffs applied to Pim J., sitting as a Judge of the Chancery Division, for the appointment of a receiver over the lands of Gerrardstown, and on November 13th, 1923, Wylie J., before whom the application came on for hearing, appointed Mr. Joseph Lowry, of Kells, receiver over the lands in question.

The receiver upon taking up the duties of his office after his appointment, found that the lands had been let by the defendant for grazing upon the usual eleven months' system

in the previous January, and that the defendant had received over £1,400 from the grazing tenants for the use of the lands which would continue until the following December. The payment was made by promissory notes due on September 9th, 1923, which had been discounted in the usual way, and there is no ground for suggesting that there was any attempt or desire on the part of the defendant to forestall the receiver.

On February 27th, 1924, Mr. Merrick, one of the plaintiffs, wrote to the defendant demanding an account of all rents and profits received by him out of the lands since January 24th, 1923, the date of the commencement of the proceedings for raising the amount of the charge, and, after some correspondence, an account of "receipts and outgoings in respect of the lands of Gerrardstown for the year 1923" was furnished by the defendant's solicitors, showing receipts amounting to £1,522 5s. 8d. and outgoings a little over that sum. After further correspondence it was agreed that the account should be referred to Chambers to be taken by the Chief Clerk; and on May 12th, 1924, upon the application of counsel for the plaintiffs, there being no appearance for the defendant, Mr. Justice Pim, sitting as a Chancery Judge, made an order directing an account to be taken at Chambers "of the rents and profits and outgoings of the part of the lands of Gerrardstown, containing 420 acres, Irish plantation measure, or thereabouts, in the originating summons mentioned, from the 24th day of January, 1923, to 1st December, 1923." The order did not state against whom the account was to be taken, by whom it was to be furnished, or what was to become of the balance, if any; but when the order came before the Chief Clerk he proceeded to deal with it, apparently upon the basis that he was dealing with the defendant as if he had been a mortgagee in possession or a trustee ordered to account from January 24th, 1923, and upon the account so taken he found by his certificate, filed November 21st, 1924, that there was "a balance due by him [defendant] of £873 8s. 5d. on foot of the said account" (paragraph 3 of the certificate).

The defendant thereupon took out a summons, dated November 28th, 1924, asking for a declaration that the Chief Clerk's certificate be varied—1, by eliminating the statement that the sum of £873 8s. 5d. or any sum was due by the defendant, and by substituting therefor a statement that the balance represented the excess of rents and profits over outgoings; 2, by deleting all the disallowances in the said certificate and finding accordingly the excess of rents and profits over outgoings.

A cross-summons was taken out on December 3rd, 1924, by the plaintiffs asking that the defendant be ordered to lodge in Court the sum of £873 8s. 5d., or, alternatively, that Messrs. Lowry & Sons, auctioneers, or Messrs. A. L. Goodbody, solicitors for the defendant, be ordered to retain in their hands the proceeds of another farm which the defendant had sold, and to lodge thereout the sum of £873 8s. 5d., with some further directions about costs.

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The summons and cross-summons were adjourned into Court, and came on for hearing before Meredith J. on December 9th, 1924, whereupon, after consideration, he made an order, dated January 16th, 1925, "that the Chief Clerk's certificate be varied by deleting from the third paragraph thereof the words 'due by him,' and by adding after the words, 'on foot of said account,' the words following, that is to say: 'representing excess of rents and profits over outgoings,' " and made no rule on the plaintiffs' application, except to put a stay for one month upon the issue of a certificate of taxation of the defendant's costs under the order of May 15th, 1923, pending an appeal by the plaintiffs.

The plaintiffs appealed from so much of the order of Meredith J. as declared "That the Chief Clerk's certificate be varied by deleting from the third paragraph thereof the words 'due by him,' and by adding after the words 'on foot of said amount' the words following, that is to say, 'representing excess of rents and profits over outgoings' "; and they asked that in lieu thereof the Chief Clerk's certificate be confirmed. They also appealed from so much of the order as made no rule on the plaintiff's application for an order: "1. that the defendant do forthwith lodge in Court the sum of £873 8s. 5d., or such other sum as may be found due in the Chief Clerk's certificate, if varied, or, alternatively, that Messrs. Joseph Lowry & Sons or Messrs. A. & L. Goodbody retain the proceeds of the sale of the lands of Staffordstown, Navan, County Meath, and out of the proceeds do lodge in Court the said amount of £873 8s. 5d. or such varied sum; 2. an order declaring the plaintiffs entitled to their costs against the defendant (with counsel) of and incident to the application and order, dated 12th May, 1924, when taxed and ascertained; 3. an order that the plaintiffs are entitled to set off the costs given to the defendant by order, dated 15th May, 1923, against the costs given to the plaintiffs under the order of 28th October, 1924, and the costs of the said application, dated 12th May, 1924, and the proceedings thereunder, when taxed and ascertained. They asked that, in lieu of this part of the order, an order should be made in the terms of the summons of December 3rd, 1924.

Dickie K.C. and *J. Henry,* for the appellant:—An equitable mortgagee is entitled to the rent and profits from the date of the application upon which the order for sale is made: Fisher's Law of Mortgage, 6th edit., page 877, par. 1727; *Ex parte Bignold* (1); *Pope* v. *Biggs* (2); *Ex parte Jennings* (3); *Ex parte Living, In the Matter of Tombs* (4); *Preston* v. *Tunbridge Wells Opera House, Ltd.* (5); *In re Metropolitan Amalgamated Estates, Ltd.*; *Fairweather* v. *the Company* (6); *In re Tate* (7); Halsbury, Vol. 21, page 190, par. 349.

(1) 2 Gl. & J. 273.
(2) 9 B. & C. 245.
(3) 2 Sw. 360.
(4) 2 Mont. & A. 223.
(5) [1903] 2 Ch. 323.
(6) [1912] 2 Ch. 497.
(7) 5 Law Rec. (N.S.) 299.

The order made by Pim J. on May 12th, 1924, is, as the letter written on May 3rd, 1924, by the defendant's solicitors shows, an order on consent, admitting liability, and, as such, amounts to an estoppel: *In re South American and Mexican Co., Ex parte Bank of England* (1).

M'Cann K.C. and *Overend K.C.* (with them *Newett*), for the respondent:—

The paragraph in Fisher on Mortgages preceding that relied upon for the appellant refers to the rights of a legal mortgagee when the estate of his mortgagor is in bankruptcy. The word "But," by which the paragraph which is relied upon is introduced, shows that it must be taken in connection with the preceding paragraph. All the cases referred to in Halsbury, vol. xxi, p. 191, and cited in support of the argument for the appellant, were cases in bankruptcy. Apart from bankruptcy, the doctrine submitted on behalf of the appellant has not been laid down in any case. Whether the mortgage be legal or equitable, if a mortgagee takes proceedings in a Court of equity he acquires no rights whatever until he obtains an order for the appointment of a receiver: *Codrington* v. *Johnstone* (2); *Hollier* v. *Hedges* (3); *Yorkshire Banking Co.* v. *Mullan* (4); *Garfitt* v. *Allen* (5); Madden's Practice before the Land Judge, 3rd edit., p. 497.

In regard to estoppel, the case of *In re South American and Mexican* Co. (1), is, as a matter of fact, a strong authority in our favour. In order that a judgment should bind parties, it must have directly decided the point which is in issue in the second action; it is only where the point in issue in the first suit, or other legal proceeding, has been actually determined that the judgment delivered therein is a bar to a subsequent action: Taylor on Evidence, 11th edit., vol. ii, pars. 1695 and 1719; *The Irish Land Commission* v. *Ryan* (6), per Holmes L.J. at p. 580; *Langmead* v. *Maple* (7), at p. 270; *The Duchess of Kingston's Case* (8); *Howlett* v. *Tarte* (9). In the order relied upon in this case as constituting an estoppel, there was no adjudication upon liability. In any event the Court could have varied its own interlocutory order: *Mullins* v. *Howell* (10).

Dickie K.C., in reply:—

A judgment given on consent is final: *Ainsworth* v. *Wilding* (11). "It is, I am aware, possible to maintain that a judgment by consent has the qualities of a judicium to which I have referred: *Bradshaw* v. *M'Mullan* (12), per Lord Shaw of Dunfermline, at p. 424.

(1) [1895] 1 Ch. 37.
(2) 1 Beav. 520.
(3) 2 Ir. Ch. R. 370.
(4) 35 Ch. Div. 125.
(5) 37 Ch. Div. 48.
(6) [1900] 2 I. R. 565.
(7) 18 C.B.N.S. 255.
(8) Smith's L. Cas., vol. ii, 10th ed., at pp. 731-32.
(9) 10 C.B.N.S. 813.
(10) 11 Ch. Div. 763.
(11) [1896] 1 Ch. 673.
(12) [1920] 2 I. R. 412.

Supreme Court. 1925.

BUTLER v. BUTLER.

March 6.

An equitable mortgagee is entitled to the rents and profits from the date on which he institutes proceedings: *Garfitt* v. *Allen* (1); *Ex parte Barnes* (2).

Cur. adv. vult.

FITZGIBBON J. delivered the judgment of the Court.

His Lordship, after stating the facts as set out above, continued:—

From the order of Meredith J. the present appeal has been taken, and two contentions have been put forward by Mr. Dickie on behalf of the plaintiffs.

The first, which is one of general application and of immense importance, is that the owner of an estate which is subject to an equitable mortgage or charge is bound to account as a trustee from the date of the institution of proceedings by the owner of the incumbrance to raise the amount thereby secured, or, if not from the date of the institution of proceedings, at latest from the date of the order for sale.

He admitted that he had found no precedent for such an order, and the experience of Mr. Justice O'Connor, who can speak for the practice of the Chancery Division since the coming into operation of the Judicature Act in 1878, has not been able to furnish any instance of one; but Mr. Dickie relied upon the following passage from the well-known work of Mr. Fisher on Mortgages, 6th edit., p. 877, par. 1827:—"But as the equitable mortgagee cannot generally take possession, his right to the rent does not arise by notice to the tenant, and is not recognised till the time of the application upon which the order for sale is made. From that time he is entitled to the rent, even though an inquiry as to the dates of his securities form part of the order." Seven cases are cited in the notes to the above passage. Read without reference to the context, or to the authorities cited, Mr. Fisher's words appear to support Mr. Dickie's contention, and they have been copied almost verbatim by the compilers of the Article on Mortgages in Halsbury's Laws of England, vol. xxi, p. 190, par. 349.

The names of the Reports from which the cases cited by Mr. Fisher are taken should suffice to put practitioners upon their guard against hasty conclusions of a general character. Every one is a Bankruptcy Report, and all were decided before the passing of the Bankruptcy Act of 1849. The previous paragraph in Mr. Fisher's work deals with the position of the legal mortgagee when the estate of his mortgagor is in bankruptcy, and a careful perusal of the cases referred to by Mr. Fisher and cited by Mr. Dickie will show that it was for the purposes of bankruptcy administration that the practice grew up in the Court of Bankruptcy of allowing an equitable mortgagee to take all rents of the mortgaged estate which came in after the date upon which he obtained an order, not in the Court of Bankruptcy but in the Court of Chancery, for sale of the

(1) 37 Ch. Div. 48.

(2) 3 Mont. & A. 497.

mortgaged estate. It was, I believe, only after the death of Mr. W. R. Fisher that the passage upon which Mr. Dickie founds his claim was made to commence a separate paragraph. In the 3rd edition of Fisher on Mortgages (1876) it follows, in par. 1492, immediately on the sentence, in the same paragraph, which states the position of "the legal mortgagee in bankruptcy."

FitzGibbon J.

The reason and justice of such a practice are obvious. The legal mortgagee could determine the possession of his mortgagor, or of his mortgagor's trustees or assignees in bankruptcy, by demand, or by issue of a writ in ejectment, or by giving notice to the tenants to pay their rent to him. If he did not choose to take any of these steps, his right to the rents did not accrue till actual sale of the lands. The equitable mortgagee could not enforce his claim by any of these methods. He had to apply to the Court for an order declaring his incumbrance well charged, and that the lands be sold to pay his charge. He could also obtain a receiver, and in a proper case could get the receiver appointed immediately after the commencement of his proceedings, and the appointment was equivalent to a taking of possession: *In re Crompton & Co., Ltd.*; *Player* v. *Crompton & Co., Ltd.* (1). But when the mortgagor's estate was under the Court of Bankruptcy, the equitable mortgagee or chargeant was in a very difficult position. He could not apply to the Commissioners in Bankruptcy, who had no jurisdiction to investigate equitable claims; the Court of Chancery could not appoint a receiver over the rents and profits of lands which were already in the custody of another Court; and so the claimant was compelled to file a petition to the Lord Chancellor for a declaration of charge and a sale of the charged lands. The mode of procedure and the reasons for adopting it may be found in the judgment of Lord Eldon in *Ex parte Jennings, In re Dawson* (2). The order for sale by the Court of Chancery was treated in the Court of Bankruptcy as a proof of the equitable incumbrancer's right which was binding upon the Commissioners, and as an entry cy pres upon the mortgaged property by him: *Ex parte Thorpe, In re Teesdale* (3).

If the estate of the mortgagor were not under the Court of Bankruptcy, neither the issue of a writ nor the filing of a petition, nor an order for sale would *per se* entitle an equitable mortgagee to receive the rents or to an account of rents received by the mortgagor: *Colman* v. *Duke of St. Albans* (4). In the case of an equitable mortgage the only means of impounding rents and profits is by obtaining the appointment of a receiver: Coote on Mortgages, 8th edit., vol. ii, p. 823; and the learned author repeats this statement of the law in similar terms on p. 1138; and the owner of an annuity or legacy charged on lands is in no better position: *Garfitt* v. *Allen* (5).

(1) [1914] 1 Ch 954, at p. 967.
(2) 2 Swanst. 360.
(3) 3 M. & A. 441.
(4) 3 Ves. Junr. 25, at p. 32.
(5) 37 Ch. D. 48.

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In Ireland, in the Encumbered Estates Court, the Landed Estates Court, and the Court of the Land Judge, the owner continued to receive the rents without any liability to an account, despite an absolute order for sale, unless and until the appointment of a receiver, and it was not the practice to appoint a receiver unless a year's interest was due upon the incumbrance, or there was some special reason, other than the mere existence of an absolute order for sale, for doing so.

So far as the question of principle is concerned, the present application appears to have been founded upon a misunderstanding of a passage in a text-book which is really applicable only to the case of an equitable chargeant upon the estate of a bankrupt. In Mr. Coote's treatise upon mortgages, 8th edit., vol. ii, p. 1138, where the cases cited by Mr. Fisher are dealt with, it is made clear that they concern only proceedings in bankruptcy. "The effect of an order for sale—*in bankruptcy*—is equivalent to an order for a receiver."

As we are not dealing with a bankrupt mortgagor, it is unnecessary to consider the question whether an equitable chargeant who had obtained an order for sale of the incumbered estate of a bankrupt was entitled to an account of the rents against the assignees from the date of his application, or from the date of the order for sale. The authorities in England are conflicting, and in Ireland Lord Plunket's decision in *Bland* v. *Goold* (1) was very strongly disapproved of by Sir Francis Blackburne in *Morrough* v. *Hoare* (2), in which he states a principle which seems not inapplicable to the present case. "In cases of decrees against wrongdoers, the filing of the bill is sometimes made the period at which accounts are to commence, but in the case of a mortgagor or a puisne creditor, rightly in possession, and afterwards displaced, I never heard that they were obliged to account for bygone rents." Indeed if accounts were to run from the filing of the bill, the difference in practice between the Equity Exchequer and the Court of Chancery in Ireland as to the commencement of liability, in the one case from the actual order appointing a receiver, and in the other from the conditional order of reference, could never have arisen.

For these reasons we are clearly of opinion that upon principle the defendant is not bound to account for any sums actually received by him before the appointment of the receiver.

Mr. Dickie, however, relies upon a second ground.

He contends that the defendant, by consenting to an order referring to Chambers the account of receipts and outgoings which he had furnished to Mr. Merrick on April 16th, 1924, estopped himself from disputing either his liability to account at all, or his liability to account as mortgagee in possession or a trustee.

As there could be no question of estoppel in pais, because there was neither misrepresentation by the defendant nor

(1) 1 Ir. E. R. 5.

(2) 5 Ir. E. R. 195, at p. 207.

alteration of the position of the plaintiffs to their prejudice, Mr. Dickie boldly argued that there was an estoppel by record, the record being the order of Pim J., dated May 12th, 1924, with which Mr. Dickie contended we were bound to read the correspondence which led up to the making of the order.

The correspondence commenced on February 27th, 1924, with a letter from the plaintiff Merrick to the defendant's solicitors in the following terms:—

Re *Gerrardstown.*

DEAR SIRS,

In this case, as you are aware, Mr. Butler collected the rents from the conacre lettings since the date when the proceedings were brought by my clients to raise the amount of their charge. As you are aware an equitable mortgagee is entitled to the rents and profits of the lands on which his mortgage is from the date that the proceedings are commenced for raising the amount of the mortgage—this was on the 24th January, 1923. Of course if Mr. Butler used these rents to pay the accruing rent he would be entitled to credit for same, but any balance over and above that goes to the mortgagees.

I must, therefore, ask you to send me an account of all rents and profits received out of the lands from the date of the application for this order, otherwise it will be necessary for me to apply to the Court in the matter for an order to account. Kindly have this matter attended to as soon as possible.

Yours faithfully,

E. E. MERRICK.

Messrs. A. & L. Goodbody replied on February 29th, saying that they would communicate with their client with a view to obtaining the figures to enable them to reply. Mr. Merrick wrote a letter on March 10th, which is not before us, but which seems to have been a protest against delay, and on March 14th, Messrs. Goodbody wrote: "As regards the account of Gerrardstown for the past 12 months, our client is working at the figures, and we hope to let you have them shortly."

On April 3rd, Mr. Merrick wrote again requesting Messrs. Goodbody to send him the account with vouchers without further delay, and after an immaterial letter, dated 9th April, 1924, Messrs. Goodbody wrote the following letter on April 16th:—

Lands of Gerrardstown.

DEAR SIR,

We enclose account showing Mr. Butler's receipts and outgoings in respect of the lands of Gerrardstown for the year 1923.

Yours faithfully,

A. & L. GOODBODY.

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To this Mr. Merrick replied on April 30th :—

DEAR SIR,

I have received your account and letter, dated 16th April, 1924, and owing to my absence from home I have not been able to go into the matter until now.

I cannot on behalf of the plaintiffs agree to the items therein. Your client received £1,472 5s. 8d. for rents in September, 1923; he also received a sum of £50 from the letting of a house, making in all a sum of £1,522 5s. 8d. I am advised he is only entitled to take credit as against this sum for the rent and taxes actually paid for the period covered by the rents referred to—he has, however, claimed a credit of £390 for rent for part of the year 1922, without bringing in the corresponding income. He has also taken credit for numerous payments which he claims to have paid, but which are not pertinent to grazing lettings.

It appears to me that the only way to settle this matter in a satisfactory way is to have it referred to the Chief Clerk to take the account. Under the order of 15th May, 1923, already made in this matter, only two special inquiries were referred to the Chief Clerk dealing with incumbrances.

In order to have this account taken, an application must be made to the Court for the additional inquiry. If you consent, the application can be made *ex parte*. If you don't consent, it will be necessary for me to issue a summons. Please let me have a reply as soon as possible.

Yours faithfully,

E. E. MERRICK.

Messrs. Goodbody replied on May 3rd :—

DEAR SIR,

We are in receipt of yours of the 30th ulto., and note that you cannnot agree to the items in our client's account, but we are advised that all the outgoings included therein are properly chargeable against the receipts. If you consider it necessary to go to the Court for an order referring the account to Chambers, we are prepared to consent to such application, which can be made *ex parte*, but of course the question of costs should be reserved.

Yours faithfully,

A. & L. GOODBODY.

Mr. Merrick then applied to Pim J. who made the order of May 12th, 1924, already set out. It is remarkable that this order, which is relied upon as a record conclusively estopping the defendant from contesting his liability to account as a trustee during a period for which no mortgagor in possession was ever yet ordered to account, does not even name the defendant as an accounting party at all. It only directs an account of the rents and profits and outgoings of Gerrardstown from January 24th, 1923, to December 1st, 1923, and reserves costs.

What representations, if any, were made to Pim J. we do not know, but Messrs. Goodbody's letter of May 3rd is expressly referred to in the order, and it seems not unreasonable to assume that there was no protracted examination of the position, and that the learned Judge was not informed of the extraordinary effect which the plaintiffs intended to attribute to the order which they were asking him to make.

In our opinion, the true construction to be put upon the correspondence does not involve any admission of liability on the part of the defendant to pay over bygone rents received by him before the appointment of the receiver. He was dealing with opponents whose litigious proclivities had brought them once already to the Court of Appeal without success, and he had not yet received a penny of the costs which they had been ordered to pay to him.

A demand was made upon him for an account of his receipts and outgoings coupled with a threat of further litigation if it was not furnished. Believing that the figures which he could present would satisfy the plaintiffs that further litigation could not result in any benefit to those whose interests they were supposed to represent, he agreed to furnish his account, and as originally furnished it showed a balance of expenditure over income. The items are challenged by the plaintiff in a letter which concludes with the statement that the only way to settle this matter in a satisfactory manner is to have it referred to the Chief Clerk to take the account, and a suggestion that the order should be made *ex parte*. Where in this was the issue as to liability knit, which is supposed to have become *res judicata* by the order? In our opinion the defendant consented to nothing more than to vouch the items of his expenditure and receipts before the Chief Clerk, and never intended to, and did not, preclude himself from contending that the plaintiffs had no right to make him refund any profits received by him out of Gerrardstown.

In our opinion the decision of Meredith J. was correct in principle.

The form of his order has been attacked by Mr. Dickie in so far as the disallowances of the Chief Clerk have been permitted to remain. The items disallowed have not been discussed before us, and we are not to be taken as having expressed any opinion upon the propriety of any allowance or disallowance if the account was being taken as between a trustee, or a mortgagee in possession or any other party who was legally accountable for bygone rents, and a beneficiary or an incumbrancer upon his estate; but Mr. Dickie admits that he can gain nothing by having an apportionment of the grazing rents between the date of the appointment of the receiver and the end of the lettings.

The order appealed from will be affirmed and the appeal dismissed with costs to be paid by the plaintiffs to the defendant.

Solicitor for the appellants: *Ernest E. Merrick.*
Solicitors for the respondent: *A. & L. Goodbody.*

Kennedy C.J. 1924.

In the MATTER of ROBERT JOHN DUDDY and AGNES MURIEL DUDDY, Minors.

Dec. 1, 20.

Practice—Jurisdiction—Infants domiciled in Northern Ireland—Funds in Court belonging to infants—Transfer of funds from Irish Free State to Northern Ireland—Principles upon which the Court will act.

The mother of two minors, who were domiciled in Northern Ireland, had been appointed their guardian by the Chief Justice of Northern Ireland, and had been given liberty to apply to the Chief Justice of the Irish Free State to have transferred to the High Court in Northern Ireland funds standing to the credit of the minors in the High Court in the Irish Free State. These funds were the only property the minors possessed. The mother applied accordingly to have these funds transferred to the respective credits of the minors in the High Court in Northern Ireland.

Held that, on the evidence, as the welfare of the minors required that the scheme of the Chief Justice of Northern Ireland for their maintenance should be financed out of the funds in Court, three-fourths of the funds be transferred to the High Court in Northern Ireland, and the income of the balance of the funds (which remained in the High Court in the Irish Free State) be paid to the mother of the minors and to the General Solicitor for Minors in the Irish Free State, who were appointed guardians of the fortunes of the minors.

Abernethy v. *Greer*, 36 Ir.L.T.R. 63, and *Donohue* v. *Donohue*, 19 L.R.Ir. 349, distinguished.

Application by the guardian of two minors to have funds standing to the credit of the minors in the High Court of Justice, Irish Free State, transferred to the High Court of Justice in Northern Ireland.

Elizabeth Duddy, residing at 4 Elmgrove Street, Belfast, who had been appointed the guardian of the persons and fortunes of the minors, Agnes Muriel Duddy and Robert John Duddy, by the Lord Chief Justice of Northern Ireland, applied for an order that the funds standing to the respective credits of the said minors in the High Court of Justice, Irish Free State, might be transferred to the respective credits of the said minors in the said matter in the High Court of Justice in Northern Ireland. The facts are set out in the judgment of Kennedy C.J.

Binchy, in support of the application, cited *In re Chatard's Settlement* (1); *Abernethy* v. *Greer* (2); *Donohue* v. *Donohue* (3); *Mullan* v. *Belfast Harbour Commissioners* (4); *In re Ferguson's Trusts* (5); *Brown* v. *Collins* (6).

Cur. adv. vult.

Dec. 20.

Kennedy C.J.:—The two minors in this matter—one a girl in her thirteenth year, the other a boy in his fifth year—live

(1) [1899] 1 Ch. D. 712.
(2) 36 Ir. L. T. R. 63.
(3) 19 L. R. Ir. 349.
(4) 32 Ir. L. T. R. 116.
(5) 22 W. R. 762.
(6) 25 Ch. D. 56.

with their mother in the City of Belfast. The mother applies to have the funds in Court, standing to the separate credit of each of the said minors, consisting in each case of £1,059 8s. 9d. 5 per cent. British War Loan and £33 18s. cash, transferred to their respective credits in the High Court of Justice in Northern Ireland. The circumstances in which the application is made are as follows:—

The father of the minors was a constable in the Royal Irish Constabulary. He joined that force in the year 1920, at which time he was, and had been living with his wife and children, the two minors, in the City of Belfast. He was killed on the 3rd March, 1921, in the County Waterford, while acting as a member of the Constabulary. On the 7th June, 1921, a decree was made by the then County Court Judge of the County of Waterford under the Malicious Injury Acts of that time, whereby he awarded compensation to the applicant as the lawful widow, and to the minors as the lawful children of the deceased constable, being his dependents within the meaning of the said Acts. The amount of the award to each of the minors was £1,000, with interest at £5 per cent. per annum from the 21st April, 1921. The amounts of the respective awards were lodged in the County Court to the separate credits of the minors.

On the 26th March, 1923, on an application made by the mother of the minors pursuant to the County Officers and Courts (Ireland) Act, 1877, the then Lord Chief Justice of Ireland made an order transferring the County Court matter to his own Chambers, and directing the Clerk of the Peace of the County Waterford to lodge the said respective sums in the then High Court of Justice to the separate credits of the minors. These are the funds the subject of the present application.

The mother of the minors was born in Belfast, has resided there all her life, and states that it is her intention to continue residing there.

The father of the minors resided with his wife and the minors in Belfast until he joined the Royal Irish Constabulary, when he was, presumably, sent under orders to other parts of the country.

The minors have never ceased to reside with their mother in Belfast, and are still living in the house occupied by their father up to the time he became a constable.

No question of religion arises, the minors and their father and mother being all members of the Presbyterian Church.

On the 18th July, 1924, on an application made by the mother of the minors, it was ordered by the Lord Chief Justice of Northern Ireland that she be appointed guardian of the persons and fortunes of the said minors during their respective minorities upon her entering into security according to the course of that Court, and she was given liberty to make application to this Court to have the funds standing to the credit of the minors transferred to the High Court of Justice in Northern Ireland.

Kennedy C.J. 1924.

In re Duddy.

It was also ordered that the minors should continue to reside and be educated at their mother's residence in Belfast. It appears from a recital in the said order that the minors have no property other than the funds standing to their credit in this Court.

In these circumstances the position appears to be that the minors are wards of this Court, and also wards of the High Court of Justice of Northern Ireland; that their natural home and domicile is in Belfast, in the jurisdiction of the Court of Northern Ireland; and that all their property is in the Saorstát, under the immediate jurisdiction of this Court; but that it is all purely personal or "movable" property.

The application here is simply to transfer the entire of the funds from this Court to the Northern Court, and it is presented as if that were something in the nature of a matter of right and of course, by reason of the minor matter pending in Belfast. The effect of granting the application in the form in which it is made would be to transfer the matter which is pending in this Court to the Court in Belfast. I understand, however, that it was decided by the late Lord Chief Justice of Ireland that there was no jurisdiction, prior to the establishment of these Courts, to make any such order. I have not been able to trace any report of that decision. But I have no difficulty myself in holding that such a transfer of jurisdiction and responsibility, whether to Belfast, or to London, or to New York, or anywhere else, is not within my power or the authority of these Courts.

Mr. Binchy has cited several decisions in support of his application. These decisions fall into two classes. In the one class we have *Abernethy* v. *Greer* (1) and *Donohue* v. *Donohue* (2) and other similar cases, where an infant domiciled abroad is entitled to funds in Court in this country and reaches an age when, by the law of his domicile, though not by the law of this country, he becomes entitled to receive, and to give an absolute discharge for, moneys which are his property. In these cases the law of the domicile has been recognised as the governing law in respect of purely personal property, that is, "movable property," and the moneys have been paid out to the minor. Such cases do not apply to the present case, which belongs to the other class, typified by *In re Chatard's Settlement* (3), where the minor domiciled outside the jurisdiction of this Court is still under the disability of infancy both according to the law of his domicile and according to the law ruling in this Court, which holds his property. A different principle governs this class of case. The infant is not, nor is his guardian or any other person applying on his behalf, entitled as of right to have the infant's funds handed over or his moneys paid out merely so as to handle and administer them in the place of domicile outside the jurisdiction of the Court. This Court must in such cases be satisfied by evidence that it is to the advantage of the infants to entertain

(1) 36 Ir. L. T. R. 63. (2) 19 L. R. Ir. 349. (3) [1899] 1 Ch. D. 712.

the application; that any moneys paid out will be applied for the benefit of the infants; and that in all the circumstances it is proper, and perhaps necessary, in the interest of the infants to let the moneys go out of the jurisdiction. Take, for example, a case where infants domiciled abroad have, in the place of domicile, property yielding income more than sufficient for their every requirement. This Court would in such a case be very slow during the minority to hand over property from its jurisdiction which could have no application for the advantage of the infants.

In the present case we have the other extreme. The minors have no property or income whatever in their place of domicile. It is the duty of this Court to make such provision as will secure, so far as their means allow, the support, maintenance, and education of the minors in their place of domicile. The property of these minors and its income will afford nothing beyond their bare necessities.

Approaching the case on the principles I have stated, I have to consider by what form of order I can best provide for the interests of these minors.

In the first place, I think I should make an order appointing the applicant guardian of the fortunes of the minors, but I will associate with her in the guardianship the Saorstát General Solicitor for minors.

Now the forum of their domicile has also taken the minors into wardship, appointed the applicant guardian of their persons and fortunes, taken control of their maintenance and education, and given specific directions for their immediate care. I am satisfied on the evidence before me that the welfare of the minors demands that the scheme of the Chief Justice of Northern Ireland for their care and upbringing be financed, and that the funds in this Court be made available for that purpose.

The next question I have to consider is whether such financial provision should be made by means of the income of the funds only or by means of capital.

Capital moneys in these smaller cases must often be called upon for purposes of advancement, as, for instance, for premiums on apprenticeship; sometimes, too, in urgent cases of illness. I think that the Northern Court should have some, at least, of the capital to call upon, if necessary, for making provision to give these children the best equipment for their future which the circumstances allow.

In accordance, then, with my view of the best interests of the minors, I propose to transfer to the minor matter in Northern Ireland three-fourths of each of the capital sums, to be applied in paying for the maintenance and education of the minors respectively, so far as possible out of income, but with liberty to apply capital if necessary.

I will retain until further order a sum of £250 out of each fund, and direct the income of these sums to be paid to the

Kennedy C.J. 1924.

In re DUDDY.

guardians whom I have appointed, to be applied by them for the support and maintenance of the minors respectively, regard to be had to this income by the Court of Northern Ireland in dealing with the transferred moneys. I shall thus be able still to maintain that care for the minors which the proceedings here have imposed on me. The General Solicitor will have liberty to apply at any time as occasion may require.

Though the summons as framed could not be granted, the applicant has properly brought the matter before the Court, and she should have her costs, when taxed, out of the moneys to be transferred, such costs to be paid before transfer.

Solicitors for the applicant: *E. & R. D. Bates.*

C. L.

IN THE MATTER OF THE ESTATE OF PATRICK FINEGAN, DECEASED; KATHERINE MATHEWS, PLAINTIFF, *v.* PATRICK S. DONEGAN AND BERNARD COOKE, DEFENDANTS. (1923. No. 593): CONSOLIDATED WITH THE ESTATE OF MARY FINEGAN, DECEASED; KATHERINE MATHEWS *v.* PATRICK S. DONEGAN. (1923. No. 603.)

Meredith J.
1925.
July 21.

Husband and wife—Death of husband intestate and without issue—Bond to secure payment of money to wife on husband's death—Satisfaction—Widow's distributive share—Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29).

F. on his marriage executed a bond, whereby, in the event of his death in the lifetime of his wife, a sum of money was to be paid to two trustees in trust for his wife. F. predeceased his wife, intestate and without issue.

Held, that the sum secured by the bond was to be regarded, in the absence of evidence of any other intention, as satisfaction *pro tanto* of the widow's share of her husband's estate.

SUMMONS to vary the Chief Clerk's Certificate.

Patrick Finegan, a farmer of Collon, Co. Louth, on his marriage with Mary M'Guinness in the year 1875 executed a bond, dated 17th August, 1875, whereby, after reciting that on the treaty for the intended marriage it was agreed that the said Patrick Finegan should by his bond secure to Mary M'Guinness the sum of £150 in the event of his death in her lifetime, the said Patrick Finegan bound himself, his executors and administrators, in the event of his death in her lifetime, to pay the sum of £150 to Francis Cooke and Patrick M'Guinness in trust for the said Mary M'Guinness.

Patrick Finegan died on October 30th, 1915, intestate and without issue, and his wife, the said Mary Finegan, took out administration to his estate. She died in 1921, and probate of her will was granted to the defendant, Patrick S. Donegan, one of her executors. After the death of Mary Finegan, the plaintiff, Katherine Mathews, took a grant of administration *de bonis non* to the estate of Patrick Finegan. On August 23rd, 1923, the Court ordered administration of both estates, consolidating the proceedings relating to both. The Chief Clerk by his certificate had found (*inter alia*) that there was no debt of Patrick Finegan remaining unpaid, but he referred to the said bond.

The defendant, Patrick S. Donegan, thereupon applied by summons to have it declared, in variation of the Chief Clerk's certificate, that there was due from the estate of Patrick Finegan to the estate of Mary Finegan the sum of £150, secured by the said bond, with interest from the date of her death, in addition to her distributive share in her husband's personal estate as his widow upon his intestacy.

Meredith J. 1925.

MATHEWS v. DONEGAN AND COOKE.

Tobias, for the applicant, P. S. Donegan :—There are three classes of cases :—

(*a*) Where the provision is expressly made in substitution for a share of the settlor's estate, in which case the wife is entitled only to the settled fund : *In re Hogan* (1).

(*b*) The ordinary case of an advancement, where the sum settled is set off *pro tanto* against the wife's distributive share on intestacy : *Blandy* v. *Widmore* (2), and notes thereto in White & Tudor, L. Cas., 8th ed., vol. ii, p. 413.

(*c*) Where the provision of the settlement is in addition to the wife's distributive share on intestacy, and she gets both : *In re Hood* (3).

This case is not within the first class, since no intention to make a substitutional gift was expressed : *In re Hogan* (1); *Coyne* v. *Duigan* (4). It is submitted that *In re Hood* (3), following *Lang* v. *Lang* (5), applies. Alternatively, it is submitted that the sum secured by the bond would be satisfaction *pro tanto* of the widow's share on her husband's intestacy.

Sheehy, for the respondent, Katherine Mathews :—The provision in the bond must be taken as having been intended in full settlement of any claims the widow might have on her husband's estate.

MEREDITH J. :—In the absence of evidence of any other intention, the first and third classes of cases cited by Mr. Tobias do not apply; the widow's estate is entitled to the widow's share on her husband's intestacy, of which the sum secured by the bond is a partial satisfaction. The application was a proper one to bring before the Court, and the costs of this application will be paid out of Patrick Finegan's estate.

Solicitor for the applicant, P. S. Donegan : *F. G. M'Keever.*
Solicitor for the respondent : *Patrick Tallan.*
Solicitor for the defendant, Bernard Cooke : *Charles O'Connor.*

G. G. D.

(1) [1901] 1 I.R. 168.
(2) 1 P. Wms. 323.
(3) [1923] 1 I.R. 109.
(4) [1894] 1 I.R. 138.
(5) 8 Simon, 451.

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COMPENSATION—*continued.*

in calculating superannuation allowance a fixed award should be made, and no part of such superannuation should be placed on a sliding scale; and (4) that in the computation of pension in respect of such bonus the same should not be limited by an over-riding maximum. *Held* by the Supreme Court (O'Connor and FitzGibbon JJ., Johnston J. dissenting), reversing Meredith J., that it was not intended by the "Articles of Agreement for a Treaty between Great Britain and Ireland" to give to Civil Servants rights of action for the recovery of compensation, and that the plaintiffs' action was unsustainable and ought to have been dismissed. O'Connor and FitzGibbon JJ. were of opinion (without expressly so deciding, it being unnecessary to do so), and Johnston J. was also of opinion, (1) that the application of the sliding scale to so much of the plaintiffs' pensions as was attributable to the bonus was correct; and (2) that the application of the "over-riding maximum" was also correct. *Wigg and Cochrane* v. *Attorney-General*

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COMPENSATION—*continued.*
Act, 1920, are (to the exclusion of the "statutory conditions" in that Schedule) the entire "terms" referred to in Art. 10 of the Treaty. *Held,* further, that the Constitution of the Irish Free State must be recognised by the Courts as an original source of jurisdiction; that since April 1, 1922, the repeal by the British Parliament of an Act extending to the Irish Free State, including the partial repeal of the Government of Ireland Act, 1920, could not affect the question as to whether or not the Act continued to be in force in the Irish Free State; and, accordingly, that such, if any, of the provisions of that Act as are not inconsistent with the Constitution of the Irish Free State were adopted into the code of law of the Irish Free State under Art. 73 of the Constitution. Meaning of "officer" and "tenure" discussed. *Cahill* v. *Attorney-General* [MEREDITH J. 70

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1. CONTRACT — CONSTRUCTION — PARISH PRIEST REMOVED BY BISHOP—*Contractual relationship — Parties bound by Canon Law of Roman Catholic Church—Evidence—Proof of Canon Law — Foreign Law—Absence of notice — Whether proceedings contrary to natural justice.*] Appellant, a Parish Priest, was removed from his parish by a Decree of Removal issued by the respondent, the Bishop of the diocese in which the parish was situated. It was admitted that the legal relationship of the parties was contractual and governed by the "Laws, Ordinances, and Canon Laws" of the Roman Catholic Church. Appellant denied the charges mentioned in the Decree of Removal, and claimed a declaration that the Decree was illegal and void on the grounds:—(1) that there was no power under the Canon Law to issue such a Decree unless a "Citation" had been first served on him, and he had an opportunity to meet the charges made against him; (2) alternatively, if the Canon Law did not require the service of a "Citation" or the granting of a personal hearing, yet the making of the Decree without notice to him was contrary to natural justice. It was contended for the appellant that the Canon Law of the Roman Catholic Church was not foreign law requiring proof by experts; that the volume of the "Codex Juris Canonici" contained the contract between the parties, constituting a written contract in a foreign language to be construed by the Court accordingly. At the trial a Classical Scholar of Dublin University gave evidence for the appellant as to the translation of portions of the Codex made by him, but he had no special knowledge of Canon Law; and for the respondent two Doctors of Canon Law who were Professors of that subject proved that, according to Canon Law, there was no necessity for the service on the appellant of a "Citation" or process of a similar nature, or for any personal hearing before the making of the Decree of Removal. *Held,* that the Canon Law of the Roman Catholic Church is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to proof of foreign law. The rule is that the foreign law applicable to a case must be taken from the statement of the expert witness as to what the law is, and not from text-books or codes referred to by him. *Sussex Peerage Case,* 11 Cl. & F. 85,

CONTRACT—*continued.*

De Bode's Case, 8 Q. B. 208, and *Nelson* v. *Bridport*, 8 Beav. 527, applied. The judgment of Lord Langdale M.R. in *Nelson* v. *Bridport*, 8 Beav. 527, having regard to the approval it has received, is to be taken as an exposition of the settled principles upon which the Court will deal with the proof of foreign law. *Concha* v. *Murrietta*, 40 Ch. D. 543, does not depart from the principles laid down by Lord Langdale, as in that case there was a conflict of expert witnesses as to the foreign law applicable. *Held*, further, affirming Meredith J., that the Decree of Removal was not illegal on the first ground relied on, because the Court must take the fact of the Canon Law which was applicable to the case as proved by the two expert witnesses called for the respondent, and they proved that the Decree was authorised by the Canon Law. Nor was the Decree illegal on the second ground relied on by the appellant (as being contrary to natural justice), because on the facts and documents, taken in conjunction with the Canon Law procedure proved to be applicable, no case of want of notice had been established. *Shaw* v. *Attorney-General*, L.R. 2 P. & D. 156; *Fisher* v. *Keane*, 11 Ch. D. 353; and *Rex* v. *Cambridge University*, 1 Stra. 557, distinguished. *O'Callaghan* v. *O'Sullivan*

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2. CONTRACT— RESTRAINT OF TRADE — SOLICITOR AND MANAGING CLERK — *Contract of service—Covenant not to practise within certain areas—Reasonableness — Ambiguity in contract — Severability of parts of contract.*] Plaintiff, having been admitted a solicitor, opened an office in Ballina, Co. Mayo, and a branch office in Charlestown, about 18 miles distant. At the same time he entered into an agreement in writing with the defendant, a solicitor's clerk of ten years' standing, by which he agreed to engage the defendant as his assistant for a period of twelve months, and on the expiration of the twelve months to grant to the defendant indentures of apprenticeship without requiring the payment of any fee, and without any reduction of the defendant's salary during such apprenticeship; and the defendant agreed not to practise within thirty miles from the towns of Ballina and Charlestown when qualified as a solicitor, nor within twenty miles from the town of Ballaghadereen, Co. Roscommon. When qualified, the defendant commenced to practise in partnership with another solicitor whose office was close to that of the plaintiff's in the town of Ballina. The plaintiff sought an injunction to restrain the defendant from practising as a solicitor within thirty miles from the towns of Ballina and Charlestown, or within twenty miles from Ballaghadereen. Meredith J., holding that the restriction was severable as regards each area defined, granted an injunction restraining the defendant from practising as a solicitor in the town of Ballina or within thirty miles from that town. *Held* by the Supreme Court (reversing Meredith J.), that the restriction could not, on any view of its construction, be upheld in its entirety, as the area which the plaintiff endeavoured to protect was too large, and went far beyond anything which he could reasonably require for his protection; and, even if the restriction was severable as to the areas defined, it could not be supported, as it was not reasonable or necessary for the protection of the plaintiff that the defendant should be restrained from practising at any place which was within a distance so great as thirty miles from Ballina and Charlestown, or from either of those towns. *Mulligan* v. *Corr* MEREDITH J. 169

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JUDGMENT MORTGAGE—*con.*

mortgage — Interest subsequently acquired not bound — Judgment Mortgage Act, 1850 (13 & 14 *Vict. c.* 29), *sects.* 6 *and* 7.] Plaintiff obtained a judgment against the defendant on 19th July, 1922, and on 3rd August, 1922, registered it under sect. 6 of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), against the interest of the defendant in certain premises. Defendant's husband had specifically bequeathed to her these premises, being the house and premises in which they were living at the time of his death in 1915. Defendant was one of the two executors of her husband's will, and both executors proved the will. After her husband's death, defendant continued to reside at the house. In 1916 an order for the administration of the estate of the defendant's husband was made, and it was found that the house and premises were personal estate outstanding or undisposed of, and that the estate was insolvent. In 1923 the Court gave liberty to the executors to assign the house and premises to F. I. in trust for the defendant, F. I. undertaking to pay all arrears of rent, and to guarantee the payment of the future gales of rent. Plaintiff contended that he was entitled by reason of his judgment mortgage to have the interest of the defendant in the premises under the order made in 1923, and the assignment made under it, sold in order to realise the amount of his judgment: *Held,* that as the defendant had lived in the house and premises and enjoyed the profits thereof for several years, she must be taken to have assented to the specific bequest of the premises to herself, and that from the date of her husband's death in 1915 to the date of the order for administration in 1916 defendant was in the position of a specific legatee who had obtained the assent of one of the executors to the bequest. But that, inasmuch as the creditors had a right to resort to any portion of the deceased's estate, including specific bequests, they could have sold the premises instead of assigning them under the order of 1923 to F. I. for the benefit of the defendant, as they had done; any interest which defendant might possibly have had ceased at the date of the making of the order of 1923, as the result was the same as if the creditors had realized the premises by sale and disposed of the proceeds. And as the

JUDGMENT MORTGAGE—*con.*

only interest which the defendant had in the premises was the contingency of her husband's estate being sufficient to pay his debts without resort to the specific bequest, or, if that were resorted to by the creditors, the right of recoupment against the estate not specifically bequeathed, the plaintiff's judgment mortgage did not affect any beneficial interest vested in the defendant. It was contended on behalf of the plaintiff that if the defendant had an interest, however slight it might be, at the date of the registration of the judgment mortgage, the effect of the Judgment Mortgage Act was to bind her present interest in the premises, although subsequently acquired. *Held,* that the defendant had no interest upon which the statute could operate, but that even if she had in law some interest at the date of the registration, it would not bind an interest subsequently acquired. Sect. 7 of the Judgment Mortgage Act, 1850, must be construed as limited to the estate or interest of the debtor at the date of the registration of the judgment mortgage. *M'Kinley* v. *Kennedy* [MURNAGHAN J. 34

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See PRACTICE—JURISDICTION.

1. LANDLORD AND TENANT — LAND PURCHASE—CALCULATION OF PURCHASE PRICE—*Judicial rent abated by agreement—Agreement not filed in Land Commission—Status of tenant, judicial or non-judicial — Land Act,* 1923 (*No.* 42 *of* 1923), *sect.* 22 (3), *and Schedule I, Parts* 1 *and* 2.] By an agreement between a judicial tenant and his landlord, the judicial rent was reduced. The agreement was not filed in the Land Commission. The tenant continued to pay the reduced rent under this agreement. *Held,* that although the agreement was not filed, the rent continued to be a judicial rent, and that the purchase price under the Land Act, 1923 (No. 42 of

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1923), was to be calculated on the basis of the reduced rent in accordance with Part I of the First Schedule to the Act. *Balfour* v. *Murtagh*
[WYLIE J. 138

2. LANDLORD AND TENANT — LAND PURCHASE — SUB-TENANTS—*Holdings situate in a village and without land — Holdings not agricultural or pastoral—Sub-tenants' right to reduction of rent—Jurisdiction of Judicial Commissioner — Land Act,* 1923 (*No.* 42 *of* 1923), *sects.* 19, 23, *and* 26.] A tenant of a large holding, which included a village, had upon it sub-tenants, whose residential holdings in the village consisted only of houses, with small plots of land attached. These sub-tenants were, with one exception, substantially dependent for their living on occupations unconnected with the land. The tenant refused to allow the sub-tenants a reduction of 25 per cent. under sect. 23 of the Land Act, 1923, and he applied to the Judicial Commissioner for a declaration that the holdings of the sub-tenants be exempted from the operation of the Act. Wylie J. held that the Act did not apply to the sub-tenants' holdings, and that the sub-tenants were not entitled to get the reduction of 25 per cent. provided by sect. 23 of the Act. *Held* by the Supreme Court, that Wylie J. had no jurisdiction to entertain the application, and that accordingly his order must be discharged. *In re Darcy's Estate* ... ... WYLIE J. 50
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3. LANDLORD AND TENANT — LAND PURCHASE — "TENANTED LAND"— *Lease— Term of years with less than sixty unexpired — Effect of reversionary lease — Land Act,* 1923 (*No.* 42 *of* 1923), *sect.* 73, *sub-sect.* 2.] A tenant who held lands under two leases, both expiring on March 25th, 1947, had obtained from his landlord a reversionary lease of both holdings for 90 years from March 25th, 1947. *Held,* notwithstanding the existence of the reversionary lease, that the lands were held for a term of years of which less than sixty were unexpired at the date of the passing of the Land Act, 1923, and that accordingly the lands were "tenanted land" within the meaning of sect. 73, sub-sect. 2, of that Act. *Martin* v. *M'Kenna*
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4. LANDLORD AND TENANT — LAND PURCHASE—WHETHER LANDS SUBJECT TO PROVISIONS OF THE LAND ACT, 1923—*Holding occupied in connection with demesne — Practice — Appeal—Time for appeal—Land Act,* 1923 (*No.* 42 *of* 1923), *sect.* 24, *sub-sect.* 2 (*c*), *sub-sect.* 8—*R.S.C.,* 1905, *Or.* 58, *r.* 15.] The time within which an appeal must be brought under sect. 24, sub-sect. 8, of the Land Act, 1923, from an order of the Judicial Commissioner, refusing a declaration that a tenancy in certain lands is subject to the provisions of the Land Act, 1923, is regulated by Or. 58, r. 15, of the Rules of the Supreme Court, 1905, and not by any rule of the Land Commission. Sub-sect. 1 of sect. 24 of the Land Act, 1923, provides for the vesting of lands in the Land Commission on the appointed day, but the sub-section is not to apply (by sub-sect. 2 (*c*)) to "any parcel of untenanted land which is a demesne . . . or any holding usually occupied by a person in connection with such demesne." It was contended on behalf of a tenant that lands adjoining demesne lands, held under a contract of tenancy, had become part of the demesne, and also that the lands were tenanted demesne, and that, therefore, the lands were excluded from sub-sect. 2 (*c*). *Held,* that the tenant's contention was unsustainable, and that the lands were within sub-sect 2 (*c*). *Held* also (by Kennedy C.J. and O'Connor J.) that, whether a particular holding is "a holding usually occupied by a person in connection with such demesne" within the meaning of sub-sect 2 (*c*), is a question of fact, and no appeal lies from the decision of the Judicial Commissioner under sub-sect. 8 of sect. 24. *In re Nugent's Estate* SUPREME COURT 15

LOCAL REGISTRATION OF TITLE — Right of public to inspect register and documents [39
See PRACTICE—INSPECTION OF PUBLIC DOCUMENTS.

LOCAL REGISTRATION OF TITLE — Title erroneously registered — Rectification of register 1
See STATUTE OF LIMITATIONS.

MALICIOUS INJURY—DAMAGE TO PROPERTY — *Compensation — Conflicting claims—Claim by owner and by equitable mortgagee.*] M. H. deposited the title deeds of a certain property

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with a bank in November, 1918, to secure an advance to her by the bank. Malicious injury was done to the property; and in November, 1920, M. H. was awarded compensation therefor by the Recorder of Dublin. The Recorder's decree was subsequently reviewed by the Compensation (Ireland) Commission, and the amount awarded by the Recorder was reduced. In 1919 M. H. signed a guarantee with the same bank for her husband's account. In September, 1921, the husband of M. H. formed a company, and in November, 1921, M. H. agreed to sell the property to the company in consideration of the allotment to her of certain shares in the company. The company was subsequently wound up on the petition of the bank, as debenture holders, and an Official Liquidator was appointed. The compensation awarded by the Compensation (Ireland) Commission was paid to the Official Liquidator, and both M. H. and the bank claimed the money. *Held,* that compensation awarded by the Compensation (Ireland) Commission was in the nature of damages obtained from the wrongdoer, and the bank as mortgagees had no claim to it. *In re Holmes, Limited*
[MURNAGHAN J. 23

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MORTGAGE — EQUITABLE MORTGAGE —MORTGAGOR IN POSSESSION — *Order appointing receiver—Time from which mortgagee is entitled to rents and profits — Distinction in case of bankrupt mortgagor — Order referring to Chambers account furnished by mortgagor—Consent of mortgagor—Effect of order—Estoppel.*] The Supreme Court *held* that the owner of an estate which is subject to an equitable mortgage or charge is not bound to account as a trustee from the date of the institution of proceedings by the owner of the incumbrance to raise the amount thereby secured, or from the date of the order for sale; but from

MORTGAGE—*continued.*
the date of the appointment of a receiver. Position of the equitable mortgagee when the estate of his mortgagor is in bankruptcy distinguished and commented on. Defendant, the owner of an estate which was subject to certain charges, consented to an order being made *ex parte* by the Judge referring to Chambers the account of receipts and outgoings which he had furnished to the plaintiffs, the chargeants, they having taken proceedings to raise the amount of the charges: *Held,* on the facts, that the defendant had not estopped himself from disputing his liability to account. *Butler* v. *Butler* SUPREME COURT 185

MORTGAGE—Bankrupt mortgagor—Date from which equitable mortgagee entitled to rents and profits of mortgaged property—Distinction when mortgagor not bankrupt 185
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PARISH PRIEST removed by Bishop — Contractual relationship — Parties bound by Canon Law of Roman Catholic Church ... 90
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"PAYMENT IN LIEU OF RENT," income derived from — Ascertainment of period when income accrued 179
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POLICE, Dublin Metropolitan — Transfer from British Government to Government of Irish Free State — Compensation on retirement — Rights of promotion and pay 70
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POSSESSION, peaceable — Representation by vendor as to giving — Default of vendor — Repudiation of contract 57
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PRACTICE — INSPECTION OF PUBLIC DOCUMENTS— RIGHTS OF THE PUBLIC—*Common Law right to inspect—Limitations on the right—Register of Titles made under the Local Registration of Title (Ireland) Act*, 1891 — *Register a public register — Whether documents kept in office of registration can be inspected—Statute infringing upon the rules of Common Law — Principles of construction — Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 56, *sect.* 94, *sub-sect.* 1 (*k*)—*Order III, Rule* 2, *of Orders and Rules made under the Local Registration of Title (Ireland) Act*, 1891, *dated September 1st*, 1910 — *Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *sect.* 104.] The register of titles to land directed to be kept by the Local Registration of Title (Ireland) Act, 1891, is a public register, and the documents which are kept in the office for the registration of titles are public documents in the fullest sense. In the case of public documents there is a Common Law right of inspection, but that right must necessarily be exercised within certain limits. The limitation laid down by Denman C.J. in *R.* v. *Staffordshire JJ.*, 6 A. & E. 84, restricting the right to those persons who could prove themselves to be interested, is obviously a proper limitation. And there are documents which, for reasons of State, ought not to be disclosed. There is nothing in the Local Registration of Title (Ireland) Act, 1891, or in the Rules made thereunder which is repugnant to the Common Law right of inspection of public documents. The obligation to keep books and indices for public inspection imposed by the Rules is in aid of the Common Law right, and does not infringe it. Principles for the construction of statutes, which affect the rules of Common Law, considered. The appellant had obtained judgment against T. F., and the judgment was not satisfied. T. F.'s father had been registered under the Local Registration of Title (Ireland) Act, 1891, as one of the owners of certain lands, and had died intestate in 1912. The name of T. F.'s father was kept on the register until October, 1924, a month or so after the issue of the writ in the action, when it was removed, and the name of T. F.'s brother was substituted. The appellant, having ascertained these facts from an inspection of a copy of the Folio at the central office of the Land Registry, and suspecting that the change in the name of the registered owners of the lands had been made with a view to evade execution against the estate of T. F. in the lands, applied for permission to inspect the application to discharge equities lodged with the Registrar and all other documents appertaining thereto. Permission was refused, and thereupon the appellant appealed to Wylie J. *Held* by Wylie J., that the permission was rightly refused, as the application to discharge equities was practically an abstract of title, and the law regarded a person's title deeds as entitled to secrecy, and that, if the application were granted, no one's title would be safe from inspection. *Held* by the Supreme Court (reversing Wylie J.), that the change in the register afforded good grounds for the suspicion that it was merely a device for saving the property of T. F. from some form of execution, and that the transaction was fraudulent. And that this gave the appellant an interest in investigating the transaction, and such investigation could not be made without a full inspection of the register.

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Accordingly the appellant ought to be allowed the inspection which he required. *In re Fitzgerald*
[WYLIE J. 39
[SUPREME COURT 42

PRACTICE — JURISDICTION — INFANTS DOMICILED IN NORTHERN IRELAND—*Funds in Court belonging to infants—Transfer of funds from Irish Free State to Northern Ireland — Principles upon which the Court will act.*] The mother of two minors, who were domiciled in Northern Ireland, had been appointed their guardian by the Chief Justice of Northern Ireland, and had been given liberty to apply to the Chief Justice of the Irish Free State to have transferred to the High Court in Northern Ireland funds standing to the credit of the minors in the High Court in the Irish Free State. These funds were the only property the minors possessed. The mother applied accordingly to have these funds transferred to the respective credits of the minors in the High Court in Northern Ireland. *Held* that, on the evidence, as the welfare of the minors required that the scheme of the Chief Justice of Northern Ireland for their maintenance should be financed out of the funds in Court, three-fourths of the funds be transferred to the High Court in Northern Ireland, and the income of the balance of the funds (which remained in the High Court in the Irish Free State) be paid to the mother of the minors and to the General Solicitor for Minors in the Irish Free State, who were appointed guardians of the fortunes of the minors. *Abernethy* v. *Greer*, 36 Ir. L.T.R. 63, and *Donohue* v. *Donohue*, 19 L.R.Ir. 349, distinguished. *In re Duddy* ... ... KENNEDY C.J. 196

PRACTICE — PARTICULARS — EXECUTOR'S ACTION — *Claim for general account— Agency— Order 19, rule 7.*] An executor brought an action against E. L. and a Bank, claiming an account of certain moneys which, he alleged, were assets of the testator. The statement of claim stated that for some years prior to the death of the testator, E. L., who was his daughter, was entrusted by him with the general management and control of his money, and that certain moneys of his were from time to time placed on deposit account in the defendant Bank in the joint names of

PRACTICE—*continued.*
the testator and E. L., and also in the name of E. L. alone. Specific sums were then stated to have been so placed on deposit, and the deposit receipts were stated to have been cashed by E. L., and the money placed on deposit account in her own name. E. L. served notice on the plaintiff to furnish particulars of the sums lodged in the Bank other than those specifically mentioned in the statement of claim, with dates of lodgment, to which the plaintiff replied that the sums and dates of lodgment were within the knowledge of E. L., and, without prejudice to claims for further sums, referred to certain specified amounts. E. L. then applied for an order to compel the plaintiff to furnish particulars. *Held*, reversing Murnaghan J., that the action being substantially one claiming a general account, in reality on the basis of agency, the defendant E. L. was not entitled to particulars. *Short* v. *Lambe* ... ... SUPREME COURT 135

1. PRACTICE — TRANSFER OF ACTION — ACTION COMMENCED IN HIGH COURT — *Transfer to Circuit Court — Whether action could have been commenced in Circuit Court — Absence of Rules and Forms for procedure in Circuit Court — Equitable and Common Law claims combined— Part of claim exceeding jurisdiction of Circuit Court—Striking out part of claim — Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 25 *and* 48 (iii).] Plaintiffs commenced an action in the High Court which could not have been commenced in, or remitted to the former County Court, but which (except as to portion of the relief sought) was within the jurisdiction of the Circuit Court. They resisted an application to transfer the action under sect. 25 of the Courts of Justice Act, 1924, to the Circuit Court on the ground (*inter alia*) that the action could not have been commenced in the Circuit Court, as required by that section, since the existing procedure of that Court, being still that of the former County Court, was inadequate, no Rules or Forms having been made for procedure in the Circuit Court: *Held*, reversing Meredith J., that though the absence of Rules or Forms is an obstacle in the way of litigants which may justify them in commencing in the High Court proceedings which might more properly be tried in the Circuit Court, this cannot deprive the High Court or the

PRACTICE—*continued.*
Supreme Court of the power to transfer, or the Circuit Court of the power and duty to hear a case which the Circuit Court has jurisdiction to entertain, and which is not fit to be prosecuted in the High Court. If the Courts of Justice Act, 1924, has conferred jurisdiction upon either the Circuit Court or the District Court to entertain a case, the Court cannot be deprived of that jurisdiction by the non-existence of Rules of procedure or Forms. *Tevlin* v. *Lisnaskea Rural District Council*, [1914] 2 I.R. 15; *Canning* v. *Farren*, [1907] 2 I.R. 486; and *Attorney-General for Ontario* v. *Daly*, [1924] A.C. 1011, followed. As the portion of the plaintiffs' claim which exceeded the jurisdiction of the Circuit Court appeared to the Supreme Court to be wholly unsustainable, even upon the allegations of the plaintiffs themselves, and must have been inserted either through inadvertence or with the express object of defeating an application to transfer the action to the Circuit Court: *Held*, following the former practice in similar cases under the Common Law Procedure Amendment Act (Ireland), 1870, that the portion of the claim which exceeded the jurisdiction of the Circuit Court should in part be struck out, and the action, subject to this amendment, should be transferred to the Circuit Court. *Courtenay* v. *M'Donnell*, I.R. 6 C.L. 35; *Cox* v. *Dalton*, 12 L.R. Ir. 420; and *Clarke* v. *Doherty*, 32 Ir. L.T.R. 43, followed. *Byrne* v. *Hughes*
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2. PRACTICE — TRANSFER OF ACTION — ACTION COMMENCED IN HIGH COURT — *Transfer to Circuit Court—Writ issued before the establishment of Circuit Courts—Action for specific performance—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *sect.* 36 — *Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 17, 21, 25, *and* 51.] The Courts of Justice Act, 1924, sect. 25, provides:—"When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may . . . apply to the High Court that the action be remitted or transferred to the Circuit Court . . ." The defendant in an action for specific performance applied to have the action transferred to the Circuit Court. At the time when the writ was issued the Circuit Court had not been established

PRACTICE—*continued.*
in that part of the Irish Free State to which it was sought to have the action transferred. *Held*, that the action could not be transferred under sect. 25 of the Courts of Justice Act, 1924, because the action could not have been commenced in the Circuit Court at the time when it was commenced, since the Circuit Court was not then established. *M'Collum* v. *Tease*, [1925] 2 I.R. 33, applied. *Moore* v. *O'Reilly*
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STATUTE OF LIMITATIONS — HUSBAND AND WIFE — HUSBAND IN POSSESSION OF LANDS AS TENANT — *Husband going away and wife remaining in possession—Wife claiming title to lands as against her husband — Character of wife's occupation—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 7 — *Wife's title erroneously registered — Rectification of register — Local Registration of Title* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 34.] Plaintiff's father died in 1896, having by his will bequeathed his small farm to plaintiff, subject to the use of two apartments and a small piece of ground, with other privileges, to his wife (plaintiff's mother), and also subject to the use, by another son, of certain workshops, with two other apartments. In February, 1897, plaintiff married, and he and his wife resided on the farm, where plaintiff's mother and brother also continued to reside. Soon after the marriage quarrels took place between plaintiff and his wife, whereupon, in November, 1897, he left the farm, and did not return until 1923, after the death of his wife. His wife continued to reside at, and manage the farm until her death. Plaintiff's mother left the farm in February, 1902, but until her death in 1914 she had the use of the small piece of ground, and received annual supplies of potatoes, &c., from the farm, as directed by her husband's will. In 1908 or 1909 the plaintiff's brother

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left the farm. On November 1st, 1906, plaintiff's wife signed an agreement for the purchase of the holding under the provisions of the Irish Land Act, 1903. On May 13th, 1909, the holding was vested in her by fiat of the Land Commission, and on November 26th, of the same year, she was registered in the Land Registry as owner in fee-simple, "subject to equities." On November 16th, 1919, the note on the register in regard to equities was, on her application, cancelled. In her affidavit in support of that application she stated that the plaintiff left the country in 1897; that he had not since been heard of, and was believed to be dead, and that since his departure she had been in sole and undisturbed possession of the lands. With the exception of two letters, written within a week after his departure, his wife had during all the years received no communication from the plaintiff. In one of these letters he asked her to sell crops, and pay some debts he owed, and in the other letter he stated he was going abroad (though he did not do so). The wife died on April 16th, 1923, and by her will devised and bequeathed the farm to her brother. Plaintiff claimed to be beneficially entitled to the farm, and sought a declaration that his wife's executor held the farm as a trustee for him. *Held*, that the plaintiff never ceased to be in possession of the farm, that his wife never entered into possession adversely to him; that she was provided with a residence and with support on his farm in fulfilment of his marital obligations; and that the Statute of Limitations never ran against him, and, accordingly, that his wife's executor was a trustee of the legal estate for him. *Held* also, that a mistake had been made in registering the title of his wife to the farm "free from equities," and that the register must be rectified accordingly. Decision of Molony L.C.J., [1924] 1 I.R. 107, reversed. *Jack* v. *Walsh*, 4 Ir. L.R. 254, distinguished. *Keelan* v. *Garvey*
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—— 12 Geo. 5, c. 4, Sch. Art. 10 70
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VENDOR AND PURCHASER — SPECIFIC PERFORMANCE — *Delay — Representation by vendor as to giving peaceable possession — Default of vendor — Repudiation of contract — Acquiescence.*] On March 18th, 1922, the defendant agreed in writing to purchase certain lands from the plaintiff, subject to Conditions of Sale which fixed April 8th, 1922, as the date for the completion of the contract. The defendant was given a verbal assurance by the plaintiff that he would be allowed to enter peaceably upon the lands, without claims, molestation, or threats by members of the plaintiff's family or other persons. On March 22nd the defendant wrote to the plaintiff's solicitor, stating that he had "withdrawn from the purchase," as he "did not wish to be interfering in family affairs," and that he had been threatened by members of the plaintiff's family. Negotiations, however, were continued; but on April 19th, 1922, the defendant, through his solicitor, definitely renounced, stating that owing to a threatening notice (in addition to several verbal threats) he could not complete. Thereupon the plaintiff gave the defendant notice that he would take proceedings. Subsequent to the date fixed for the completion of the contract by the defendant, the plaintiff advertised for sale meadows on the land, and the defendant, who was the owner of other farms, released the purchaser of one of these, which he had agreed to sell in consequence of his proposed purchase from the plaintiff. On June 13th, 1923, the plaintiff issued a writ, claiming specific performance of the contract, or, alternatively, damages for non-completion. Defendant pleaded misrepresentation by the plaintiff as to giving peaceable possession. *Held* by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), affirming Pim J., that on the ground of delay, accompanied by acts which were only consistent with the plaintiff's acquiescence in the repudiation of the contract and his election to treat it as at an end, the plaintiff was not entitled to equitable relief. *Held* by Kennedy

VENDOR AND PURCHASER—*con.*
C.J., that the defence of representations inducing the defendant to enter into the contract was a real defence, as the defendant made it clear that he must get the goodwill of the plaintiff's family, and the plaintiff was never in a position to give the defendant the lands with such goodwill. In the sale of what may be called a "family holding" in this country this "goodwill" cannot be ignored as a factor in the transaction. *Guerin* v. *Heffernan* . SUP. CT. 57

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1. WILL—CONSTRUCTION—*Bequest of "books, furniture, and effects of every kind of which I may die possessed"—Second residuary clause — Whether money on deposit receipt captured by "effects"—Meaning of "effects"—Exclusion of ejusdem generis rule.*] Testator's will, after certain legacies, proceeded: "I direct my executors, as soon after my death as they conveniently can, to sell and convert into money my books, furniture, and effects of every kind of which I may die possessed, and to hand over the proceeds of such sale, after payment of my just debts and funeral and testamentary expenses," to his brother T. S. M., to be applied by him in the same way and for the like purposes as a previous bequest in the will. Testator, at the end of his will, appointed his brother T. S. M. his residuary legatee. *Held* by the Supreme Court, affirming Murnaghan J., that the word "effects" carried a sum of money standing on deposit receipt in the bank in testator's name at the date of his death. *Malone* v. *Malone*
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2. WILL — CONSTRUCTION — *Gift to daughters and their children — Gift over in event of daughters dying without leaving issue surviving — Concurrent gift — Gift in succession — Personalty — Exclusion of rule in Wild's Case.*] Testatrix, who died possessed of real and personal estate, by her will gave and bequeathed certain houses to trustees upon trust to apply the rents and profits for the maintenance of her children until her sons attained age or obtained suitable

WILL—*continued.*
employment (which events happened), and then "in trust as to all my said property for my three daughters equally, share and share alike, and their children respectively, and from and after the death without leaving children surviving of all or any of my said daughters then, as to the share or shares of such of my said daughter or daughters so dying without issue aforesaid," in trust for her sons. At the time the testatrix made her will her three daughters were unmarried. After the death of testatrix two married and had issue, and the third died unmarried. For the purpose of making title on a sale of portion of the property (a house held for a term of years), it was necessary to determine the interests of the two married daughters therein. *Held,* that the will showed a sufficient intention on the part of the testatrix that each daughter and her children should take in succession, and not concurrently. And as there was a sufficient indication of the intention of the testatrix that the children of each daughter should take in succession to their mother, there was nothing in the rule in *Wild's Case,* 6 Rep. 16 *b,* which made it impossible to carry out that intention. And even if the context did not show that the children were to take in succession, the weight of authority was against the application of the rule in *Wild's Case* to personalty. *In re Jones, Lewis* v. *Lewis,* [1910] 1 Ch. 167, discussed. *Conyngham* v. *Tripp* MURNAGHAN J. 27

3. WILL — INCOME OF RESIDUARY ESTATE—*Income derived from "compounded arrears of rent" and "payment in lieu of rent" under Land Act,* 1923—*Ascertainment of period when income accrued — Land Act,* 1923 (*No.* 42 *of* 1923), *sects.* 19 *and* 20.] Part of a testator's estate consisted of tenanted land to which the Land Act, 1923, applied, and the trustees of the will received from the Irish Land Commission certain sums in respect of "compounded arrears of rent" and "payment in lieu of rent" under that Act. It having become necessary to determine for what year these sums should be regarded as income: *Held* that, in view of the control exercised by the Land Commission as regards both the time of payment and the collection of "compounded arrears of rent," and in view of the fact that the trustees of the will had no discre-

WILL—*continued.*

tion in the matter, the moneys received by the trustees in respect of "compounded arrears of rent" should be treated as income of the period in which they were received, and that the moneys received in respect of "payment in lieu of rent," being in substance an abated rent, should be treated as income of the period in respect of which they were collectable. *Coffey and Anderson* v. *Barrett*

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